Canada. Secretary of State, Dept.of the

Correspondence with the Colonial Secretary in re disallowance of the Provincial Statutes.

(RETURN TO ADDRESS;)

CORRESPONDENCE WITH THE

COLONIAL SECRETARY

IN *re* DISALLOWANCE OF THE

PROVINCIAL STATUTES.

Printed by Order of Parliament.

OTTAWA:
PRINTED BY MACLEAN, ROGER & CO., WELLINGTON STREET.
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1876.

RETURN

To an ADDRESS of THE HOUSE OF COMMONS, dated 2nd March, 1876;—For all correspondence with the Colonial Secretary on the subject of the exercise of the power of disallowance of the Provincial Statutes.

By Command.

R. W. SCOTT,
Secretary of State.

DEPARTMENT OF THE SECRETARY OF STATE,
OTTAWA, 4th March 1876.

(No. 89.)

GOVERNMENT HOUSE,
OTTAWA, 7th April, 1875.

MY LORD,—I have the honor to inform your Lordship that the Honorable Mr. Blake, member for South Bruce, on the 22nd February, gave notice that he would move, in the House of Commons, the following resolutions:—

"That by the 56th clause of the British North America Act, 1867, it is in effect enacted that when the Governor General assents to a Bill in the Queen's name, the Queen in Council may within two years after its receipt disallow such Act.

"That by the 90th clause of the said Statute it is enacted that the above provision shall extend and apply to the Legislatures of the several Provinces as if re-enacted, with the substitution of the Lieutenant-Governor for the Governor General, of the Governor General for the Queen, of one year for two years, and of the Province for Canada.

"That, in the opinion of this House, the power of disallowance of Acts of a Local Legislature conferred by the said Statute is thereunder vested in the Governor General in Council, and that His Excellency's Ministers are responsible to Parliament for the action of the Governor General in exercising or obtaining from the exercise of the said power.

"That, by a letter dated 13th December, 1872, the Registrar of the Privy Council of the United Kingdom conveyed to the Colonial Office the opinion of the Lord President of the Council, that the power of confirming or disallowing local Acts is under the said Statute vested in the Governor General acting under the advice of his constitutional advisers.

"That, notwithstanding the premises, by a despatch dated 30th June, 1873, the Secretary for the Colonies, in response to an application from the Governor General for instructions on the subject, informed His Excellency that he was advised by the Law Officers of the Crown that the question of disallowance or allowance of Local

Acts is a matter in which His Excellency must act on his own individual discretion, and in which he cannot be guided by the advice of his responsible Ministers.

"That this House feels bound, in assertion of the constitutional rights of the Canadian people, to record its protest against and dissent from the said instruction, and to declare its determination to hold His Excellency's Ministers responsible for his action in the exercise of the power so conferred by the said Statute."

An opportunity of bringing the subject before the House did not occur until Wednesday, March 31st, when Mr. Blake moved the adoption of the resolutions of which he had given notice; but after a debate, in the course of which Mr. Mackenzie and Sir J. A. Macdonald expressed their assent to the constitutional doctrines laid down by Mr. Blake, that gentleman withdrew his motion.

I have the honor to enclose a copy of the parliamentary report of the debate that took place on that occasion.

I have, &c.,

(Signed), DUFFERIN.

The Right Honorable
The Earl of CARNARVON,
&c., &c., &c.

CORRESPONDENCE relating to the exercise of the Prerogative of Pardon in New South Wales.

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CORRESPONDENCE relating to the exercise of the Prerogative of Pardon in New South Wales.—*Continued.*

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APPENDIX.

CORRESPONDENCE RELATING TO THE EXERCISE OF THE PREROGATIVE OF PARDON IN NEW SOUTH WALES.

No. 1.

Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(Received 31st August.)

GOVERNMENT HOUSE,
SIDNEY, 29th June, 1874.

MY LORD,—With reference to Lord Kimberley's despatch of the 17th February, 1873, and to previous correspondence, as to the exercise of the prerogative of pardon, I have the honor to forward a copy of a printed paper which has been laid before Parliament showing the decision arrived at by the Executive Council on this subject.

I have, &c.,
(Signed), HERCULES ROBINSON.

(Inclosure in No. 1.)

1873-4—NEW SOUTH WALES.

Prerogative of Pardon. (Despatches and Correspondence respecting the.)

Presented to both Houses of Parliament by Command.

(No. 1.)

His Excellency the Governor to the Secretary of State for the Colonies.

GOVERNMENT HOUSE,
SIDNEY, 14th July, 1869.

MY LORD,—Considerable inconvenience has been experienced here by the practice of nearly always referring petitions for remission of sentences to the presiding Judge or Magistrate, even when no point of law or evidence might be involved.

2. The time of the Governor also is often unnecessarily occupied (although that is a matter of less consequence) by the reconsideration of cases upon petitions by prisoner's friends, although perhaps the case may have been more than once before disposed of.

3. The Colonial Secretary has submitted to me the accompanying paper, with a view to some alteration of practice being made. The question, however, of the personal responsibility of the Governor in granting or withholding remissions of sentences arises; and before deciding the matter absolutely as far as relates to that part of the subject, both Mr. Robertson and myself would be glad to be favored with your Lordship's views in the matter, as to what weight the recommendation of the Colonial Secretary ought to have with the Governor—whether, in fact, the latter is bound by his instructions to act on his own independent judgment or not.

4. I have noted in the margin of Mr. Robertson's paper my views with regard to a point on which I do not quite agree with him.

I have, &c.,
(Signed), BELMORE.

(No. 2.)

Minute by the Colonial Secretary respecting Petitions from Prisoners for Remission or Mitigation of Sentence.

1. I am induced, not less by the frequency and irregularity of petitions presented for the remission or mitigation of the sentences of prisoners, than by communications which have been addressed to me by his Honor the Chief Justice and Mr. District Court Judge Simpson, to submit for consideration certain suggestions for the more satisfactory dealing with such petitions, by which it is hoped the time of the Judges, to whom they are referred for report, and of His Excellency, to whom they are submitted for decision, may be less trespassed upon.

2. It may be admitted that, as a rule, all evidence which can be adduced in favor of the prisoner is so adduced before sentence is passed upon him.

3. That in view of surrounding circumstances the sentence is not excessive, and that the only mitigation, therefore, which the prisoner or his friends can claim or expect is that provided by the gaol regulations for good conduct. Such remission becomes due at a certain time, is recommended by the Sheriff or Superintendent at Cockatoo Island, and cannot properly be made the subject of petition.

4. It follows, therefore, as it appears to me, that the petitions requiring special notice are exceptional, containing statements of new evidence requiring reference to the Judge, and perhaps to the Crown Law Officers, or particular circumstances not before known, calling for the exercise of the prerogative of mercy.

5. In the former class of cases reference to the Judges or the Crown Law Officers should, of course, be continued, but in the latter class of cases no such reference would be needed.

6. In England the administration of the prerogative of mercy has devolved upon the Secretary for the Home Department (answering in some sort to the Colonial Secretary here), who is considered as directly responsible for the same. (See "Todd's Parliamentary Government in England," vol. 1, folios 343, 4, 5.)

7. It is submitted, therefore, that in all future cases the reference to the judges on legal points or evidence should continue, but that, an expression of the opinion of the Minister should accompany the petitions submitted, whatever they be—such expression being viewed as embodying no more than a recommendation in the matter, of which the decision is within the competency of His Excellency.

8. It may be considered desirable, notwithstanding the right of petition, that all petitions from prisoners or their friends should be forwarded through (or be referred to) the sheriff or the Superintendent of Cockatoo Island, as the case may be, and that frivolous petitions, or false representations, should be disregarded.

(Signed), JOHN ROBERTSON.

[Date omitted—must have been early in July 1869.]

(No. 3.)

The Secretary of State for the Colonies to His Excellency the Governor.

Downing Street,
4th October, 1869.

My Lord,—I have the honor to acknowledge the receipt of your despatch No. 111 of the 14th of July, asking for instructions on the question whether a Colonial Governor is bound to act on his own independent judgment in deciding upon the petitions frequently presented for the mitigation of sentence passed upon a prisoner, or what weight he should attach to the advice of the Colonial Secretary.

The responsibility of deciding upon such applications rests with the Governor, and he has undoubtedly a right to act upon his own independent judgment. But unless any Imperial interest or policy is involved, as might be the case in a matter of

treason or slave-trading, or in matters in which foreigners might be concerned, the Governor would be bound to allow great weight to the recommendation of his Ministry.

I have, &c.,
(Signed), GRANVILLE.

(No. 4)

The Secretary of State for the Colonies to the Officer administering the Government of New South Wales.

(Circular.)

Downing Street, November 1, 1871.

My Lord,—Questions having been recently raised in the Colony of New Zealand as to the powers vested in the Governor of a Colony to grant pardons, it became necessary for Her Majesty's Government to consider carefully the various bearings of this important subject; and I have now to transmit to you, for your information and guidance, the conclusion at which they have arrived.

The cases which have to be dealt with may be classed under the five following heads:—

1. Pardon of convicted offenders.
2. Pardon or security of immunity to a witness fearing to criminate himself.
3. Pardon of an accomplice included in a prosecution, and turning Queen's evidence.
4. Promise of pardon to an unknown person concerned in a crime, but not being the principal offender, in order to obtain such information and evidence as shall lead to the apprehension and conviction of the principal.
5. Promise of pardon to political offenders or enemies of the State.

With respect to the pardon of convicted offenders, a Governor has already full powers under the terms of his existing Commission.

I am not aware whether in the Colony under your government it has been the practice for the Governor to leave signed pardons in blank, to be filled up and used during his tempory absence from the seat of Government. But as the question has been raised whether this procedure is admissible, I may here observe, for your guidance, that such a course would be irregular, and I am not aware of any circumstances which could justify it. The Governor, as invested with a portion of the Queen's prerogative, is bound to examine personally each case in which he is called upon to exercise the power entrusted to him, although, in a Colony under responsible Government, he will of course pay due regard to the advice of his Ministers, who are responsible to the Colony for the proper administration of justice, and the prevention of crime, and will not grant any pardon without receiving their advice thereupon.

When the person whom it is proposed to pardon has been already convicted, there can be no sufficent reason why the case should not stand over until it can be duly submitted to the Governor.

With respect to the second head, namely, the pardon of a witness fearing to criminate himself, it is undoubtedly necessary that means should exist by which the evidence of such a witness may be obtained. This case, however, may be better provided for by local legislation than by the exercise of the Royal prerogative through the Governor. The Judge presiding at the trial should be empowered to give a certificate under his hand, that the evidence of the witness was required for the ends of justice, and was satisfactorily given; and such certificate should be a bar to all proceedings in respect of the matters touching which the witness has been examined.

With respect to the third head, namely, the pardon of an accomplice included in the prosecution, and turning Queen's evidence, it appears to Her Majesty's Government that no local legislation, nor alteration of the Governor's Commission is needed, and the practice in England upon this point may properly be adopted in the Colony.

In England a pardon is not granted before the trial, neither has the party admitted as Queen's evidence any legal claim to a pardon, nor has the Magistrate before whom the original examination is taken, any power to promise him one on condition of his becoming a witness.

In such cases where the accomplice's evidence has been obtained (which can be done either by his pleading guilty, or by the Crown entering a *nolle prosequi* against him before calling him as a witness against his accomplice), and he appears to have acted in good faith, and to have given his evidence truthfully, he is always considered to have an equitable claim to the merciful consideration of the Court, which is usually extended to him by the Judge presiding at the trial, by the infliction of minor, or in some cases of a merely nominal, punishment.

With respect to the fourth head, namely, the promise of pardon in order to discover and convict the principal offender, Her Majesty's Government will be prepared, in future Commissions, to vest in the Governors of Colonies the power of granting a pardon to any accomplice, not being the actual perpetrator of the crime, who shall give such information and evidence as shall lead to the apprehension and conviction of the principal offender.

It is not, however, considered necessary to issue at once supplementary Commissions for this purpose, as you (or your Executive Council, if an emergency should compel them to take action at a time when you are absent and cannot be immediately communicated with) can issue a notice that the grant of Her Majesty's gracious pardon to any accomplice who shall give such information and evidence will be recommended. Such notice, which is similar to that issued in England in like circumstances, will have the desired effect, and the formal authority to grant the pardon can in due course be transmitted to the Governor by the Secretary of State.

Lastly, with respect to the fifth head, namely, the promise of pardon to political offenders or enemies of the State, Her Majesty's Government are of opinion that, for various reasons, it would not be expedient to insert the power of granting such pardons in the Governors' Commissions; nor do they consider that there is any practical necessity for a change.

If a Governor is authorized by Her Majesty's Government to proclaim a pardon to certain political offenders or rebels he can do so. If he is not instructed from home to grant a pardon, he can issue a proclamation, as was done in New Zealand in 1865 by Sir G. Grey, to the effect that all who had borne arms against the Queen should never be prosecuted for past offences, except in certain cases of murder. Such a proclamation would practically have the same effect as a pardon.

The above-mentioned are, I believe, all the cases for which it is necessary to provide, and I trust that this explanation will have the effect of removing, for the future, any doubt as to the exercise of the prerogative of pardon in the Colony under your Government.

I have, &c.,

(Signed), KIMBERLEY.

(No. 5.)

The Administrator of the Government to the Secretary of State for the Colonies.

Government House,
Sydney, 30th May, 1872.

My Lord,—Your despatch of the 1st November, 1871, marked Circular, respecting the powers of a Colonial Governor to grant pardons, was received by Lord Belmore on the 25th of December, and immediately forwarded by him to the Cabinet. It was not returned here until the 18th April, a delay occasioned, I believe, by other engagements of the late Attorney-General, whose report was desired as to the practice observed in this Colony.

2. Your Lordship's despatch appears to have been occasioned by some questions raised, and, therefore, I presume, some difficulties felt, in New Zealand. With respect to the Governor's pardoning power, I am able to state that no question has arisen or difficulty been experienced in New South Wales; although if we construe literally the terms of his Commission, difficulties might easily be made. The only questions which have arisen here relate to a different, although a kindred point; namely, in what cases the Governor ought to consult his Ministers before granting or refusing a pardon, and how far, if at all, he is bound by their opinion.

3. Those questions have respect to pardons, absolute or conditional, after an offender's conviction, being the subject which is classed, in your Lordship's despatch, under the first head or division.

4. With regard to the second, third and fourth divisions of the subject (so called in the despatch,) I have had a large experience in such matters, both as a Law Officer and a Judge; and I confirm Sir James Martin's statement that the English practice respecting pardons, or the promise of pardon, prospectively, to witnesses and accomplices has invariably been adopted in New South Wales, as also, I believe, in the sister Colonies. The legal power of the Governor to pardon, in such cases, may be doubtful. Practically, however, no inconvenience has arisen, because the power of prosecuting is in all cases vested exclusively in the Attorney-General. Should a person ever happen to be convicted to whom a promise of pardon or protection had been held out by the Governor's authority, the pardoning power could then confessedly be exercised, as of course in such a case it would be.

5. On the class of cases fifthly specified, relating to political offenders and State enemies, no observation seems necessary; as no case of the kind, that I remember, has ever occurred in New South Wales.

6. I am glad to learn from your Lordship that the Commissions to Governors will in future be amended, by conferring in express terms the power of pardoning parties prospectively. At present (Clause 6 in Lord Belmore's Commission), the authority given is restricted to convicted offenders. It will hereafter embrace, I presume, all persons "guilty or supposed to be guilty" of any crimes committed in the Colony, after which, I would suggest the addition of the words "or for which the offender may by law be tried therein." The power will then include cases of kidnapping and other offences in these seas, in which its exercise may be found of service.

7. By the Governor's instructions (clause 8 in those issued to Lord Belmore), he is "in all cases" to consult with the Executive Council, except when material prejudice would be sustained thereby, or the matters shall be too trivial or too urgent to render such consultation advisable. Now, does this instruction apply to cases of petition for pardons or mitigation, where the sentence is not capital? By clause 13, the Governor is specially required to consult his Council in capital cases, and not to grant or withhold a pardon, until after receiving their advice. Nevertheless, he is to act eventually on his own deliberate judgment, whether the Council shall have concurred with him or not.

8. What is to be the Governor's course when the sentence was to imprisonment with hard labor (penal servitude) or to a fine and imprisonment, and the prisoner's friends, or sympathisers with his family, think the punishment too severe originally, or that he has after a certain period endured enough, or, perhaps, that the evidence was not sufficient, or that circumstances subsequently discovered or arising call for a mitigation?

9. The practice hitherto adopted has been, almost as a matter of course, to refer petitions containing any such representation to the sentencing Judge. The consequence is—petitions of one or the other of these classes being numerous—that his time is largely occupied, if he does his duty by reporting fully in, (substantially) trying the case over again, and justfying his sentence to the Executive, or explaining why for the sake of the community it ought to be endnred. I have always thought that these references should be exceptional---made sparingly and with due discrimination---and yet, that the Governor ought never (or except under very peculiar circumstances) to mitigate a criminal's punishment without reference to and

report from the Judge. In the majority of cases I am enabled to say, from my long experience, that these petitions require no such reference; but, notwithstanding the number of signatures generally attached to them, that they may summarily and most justly be rejected.

10. On this point of the subject I would refer, with approval, to Mr. Secretary Robertson's Minute of July 1869, of which a copy was transmitted to Lord Granville in that month by Lord Belmore, when asking for an official instruction whether he was bound, in deciding on such petitions, to act on his own independent judgment. Mr. Robertson suggested that the Colonial Secretary should, in every instance, submit his recommendation or opinion with the case, leaving its decision then to the Governor. And Lord Granville, in answer, by his despatch of the 4th October, 1869, seems to have (in effect) adopted the principle, observing that the Governor has undoubtly a right to act on his own judgment, but that (in all matters at least of purely local concern) he ought to allow great weight to the recommendation of his Ministry. Your Lordship's Circular, the receipt of which I am acknowledging, appears to carry this instruction further, by the opinion, if not positive direction, that the Governor ought not to grant any pardon without receiving their advice.

11. It is necessary to state therefore what is (and, so far as I can learn, what always has been, the course pursued in this Colony: in order that, if it shall be thought by your Lordship to be incorrect or undesirable, a different system may be adopted.

12. The Colonial Secretary, in whose department all correspondence on the subject of crime, after conviction, is carried on, does not in the first instance express any opinion on a petition of pardon or mitigation. He may have done so in a few cases, but as a general rule he certainly does not. The mode of dealing with the petition is determined, and in effect all references concerning it are directed, by the Governor, a very considerable portion of whose time is occupied (I may say in every week), in the investigation of and deliberation upon such cases. Neither does the Governor, in general, confer with any Minister on them; although occasionally he asks the Colonial Secretary or Attorney-General to advise him. But, as the Governor's decision is always minuted on the papers, with or without his reasons for it, the Colonial Secretary before acting on or communicating that decision, has the opportunity of forming an opinion for himself, and of submitting the case to the Governor for re-consideration, should he desire to do so.

13. In this way, I submit to your Lordship, the views expressed in Mr. Robertson's Minute, and in Lord Granville's despatch, although the order of proceeding is reversed and practically observed.

14. It remains only to mention, that no such practice as that of signing pardons in blank, adverted to by your Lordship, has ever (in, I believe, even a single instance) prevailed in the Colony.

15. Although it is not strictly on the subject of pardons, I would ask a re-consideration of clause 406 in the Colonial Regulations (edition 1867) respecting the Judges' notes in capital cases. The Royal Instructions accompanying the Governor's Commission require only that the Judge shall make a report of every such case tried by him, and attend the Executive Council when taken into consideration there, for the pupose, I presume, of affording further information if desired. The Judge accordingly does always attend, and he brings his note book with him, reading portions of the evidence from it, when explanation is asked by any Member. More than this I submit is unnecessary, and may even be embarrassing to the Governor. It is not impossible that the instruction referred to was intended as a substitute for the Regulation, but the latter, if in force, requires a Governor invariably to peruse the notes (necessary therefore the whole) before decision; unless, indeed, he shall exercise the power of pardon, in which case it seems he need not read them.

I have, &c.,

(Signed), ALFRED STEPHEN.

(No. 6.)

The Secretary of State for the Colonies to His Excellency the Governor.

Downing Street, February 17, 1873.

Sir,—I have had under my consideration the questions raised by Sir A. Stephen, in his despatch, No. 48, of 30th May last, in reply to my Circular of 1st November, 1871, respecting the powers of a Colonial Governor to grant pardons, but I deferred replying to that despatch until I had received answers from the other Colonies, to which my circular despatch was transmitted. As, however, it will not be necessary to issue any further circular, I proceed to deal separately with the points raised by Sir A. Stephen.

The terms of your Commission extending the power of granting pardons to other than convicted offenders, dispose of one of his suggestions, but I am of opinion that the additional words which he has proposed to meet the case of kidnapping and other like offences, committed out of the Colony, but triable within, may properly be inserted in future Commissions.

With respect to that part of his despatch which refers to the question of the Governor consulting his Council upon for petitions for pardon,—I may observe that there is no real inconsistency, as is apparently supposed, between my circular and Lord Granville's despatch of the 4th October, 1869. It was pointed out that a Governor in granting pardons is exercising a portion of the Queen's prerogative, and has strictly a right to exercise an independent judgment; but that in a Colony under responsible Government a Governor would (as stated by Lord Granville) be bound to allow great weight to the recommendation of his Ministry; in other words, he would (as stated by the Circular) be bound not to grant any pardon without receiving their advice thereon.

It was not, however, intended to lay down a rule that a Governor should in all cases formally consult with his Ministers in Council, as is provided by the Royal Instructions in respect of capital cases; and I see no objection to the Governor consulting, or acting upon the advice of the Minister who is, for the time being, primarily concerned in such matters, in whatever manner is most convenient to both.

With reference to the suggestion made by Sir A. Stephen in the postcript to his despatch, I will consider whether any modification of Clause 406, of the Colonial Regulations is required. It appears to me that the regulation is substantially complied with by the practice adopted in New South Wales; and a strict observance of the regulation is clearly necessary when, for some reason, the presiding Judge is unable to attend.

I have, &c.,

(Signed), KIMBERLEY

———

(No. 7.)

Minute for His Excellency the Governor.

I have given much consideration to the expediency of changing the system of treatment in the cases of petitions presented for the absolute or conditional pardon of convicted offenders, and have carefully read the correspondence on the subject, commencing with Lord Belmore's despatch, of July 14, 1869, and closing with Lord Kimberley's despatch of February 17, 1873.

The minute of Mr. Robertson, which gave rise to this correspondence, does not appear to me to deal with the real question which the despatches of the Secretary of State present for determination in the Colony. That question, in any view, is the extent to which the Minister is to have an active voice in the decision of these cases; but in my view it is much more—it is whether the Minister is virtually to decide in

every case upon his own direct responsibility, subject of course to the refusal of the Crown to accept his advice, which refusal at any time should be held to be, as in all other cases, tantamount to dispensing with his services. The seventh paragraph of of the minute alone touches the question of the Minister's relation to the Crown, and it seems to prescribe a position for the Minister, in which, on submitting petitions to the Governor, he is to express an opinion on each case, to be "viewed as embodying no more than a recommendation," after which he is to have no further concern in the matter. I cannot subscribe to this principle of Ministerial conduct, if this be what was intended by Mr. Robertson.

There can be no question, I believe, that from the beginning of the present reign the Home Secretary in England decides absolutely in all matters of this kind in the name of the Crown, and that the Crown does not in practice interfere. At no former time when the Crown took an active part in such decisions, could the Crown, in the nature of things, be subject to a superior or an instructing authority. The wide difference between the position of the Minister and his relations to the Crown and to Parliament in the Colony and in England is at once apparent on reading the despatches from the Secretary of State. The Governor is invested with the prerogative of the Crown to grant pardon, and by the letter of the instructions conveyed to him by Lord Kimberley's Circular of November 1, 1871, he "is bound to examine personally each case in which he is called upon to exercise the power entrusted to him." By the instructions previously conveyed to the Governor of this Colony by Lord Granville, in reply to Lord Belmore's despatch of July 14, 1869, he is told "that the responsibility of deciding upon such applications rests with the Governor," and, in reference obviously to advice that may be tendered, it is expressly added that the Governor "has undoubtedly a right to act upon his own independent judgment." And, finally, after the question has been re-opened by Sir Alfred Stephen, it is repeated by Lord Kimberley's despatch of February 17, 1873, that "in granting pardons" the Governor "has strictly a right to exercise an independent judgment."

It seems to be clear that the "portion of the Queen's prerogative" entrusted to the Governor of a Colony, unlike the prerogative in England, is intended to be a reality in its exercise. It is undeniably the case that the Representative of the Crown in a Colony, unlike the Crown itself, is subject to a superior or instructing authority. What, then, is the position of the Minister, and what is intended to be the nature of the advice he may be called upon to give, and under what circumstances is that advice to be given ?

In no sense of responsibility, in this respect, has the Minister in this Colony hitherto been in the same position as the Home Secretary in England. He has neither exercised the function of pardon, nor, as a rule, been asked for advice. Except in rare cases, and then only in a limited degree, when special features or new facts have presented themselves, he has never actively interfered. What would be his position, if he entered upon a system of partial advice, and accepted in matters of the gravest moment a secondary or limited authority, irreconcileable with the nature of his duties and responsibilities as a Minister under Parliamentary government?

Lord Granville says, "the Governor would be bound to allow great weight to the recommendation of his Ministry." The Circular of November 1, 1871, says, "he will, of course, pay due regard to the advice of his Ministers." Lord Kimberley, in his despatch of February 17, 1873, repeats the words of Lord Granville.

It cannot be doubted that the advice here intended is wholly distinct in its nature from the advice given in the general conduct of affairs. In the general case the advice is uniformly accepted, as the first condition of the adviser continuing to hold office. In all his acts the Minister's responsibility to Parliament is simple, undivided, and direct. But in pardoning convicted offenders, the Governor, although he is to "pay due regard to the advice of his Ministers," is at the same time informed by the Secretary of State that he "is bound to examine personally each case in which he is called upon to exercise the power entrusted to him," and that with him rests the responsibility. The exceptional advice implied seems to be of the nature of opinions or suggestions, to which weight may be attached as coming from persons "responsible

to the Colony for the proper administration of justice and the prevention of crime," but which in any case, or in every case, may be partially or wholly disregarded.

It does not appear to be clear that the Governor is required by the Secretary of State to seek even this secondary class of advice in all cases. It would rather seem that the instruction does not necessarily extend beyond cases in which pardons are proposed to be granted, in which cases the Minister would simply have to concur in a decision already formed, or be placed in the somewhat invidious position of objecting to the extension of mercy. This view would shut out from the Minister's limited power of advice the numerous cases in which much concern is frequently felt by portions of the public, where a merciful consideration is prayed for and is refused.

I entertain grave doubts whether any change at present from the system which has hitherto prevailed will be beneficial to the Colony. In a community so small as ours, the distinctions between classes are very slight. The persons entrusted with authority and the relatives and friends of prisoners move closely together. The means of political pressure are easily accessible. A larger share by the Minister in the exercise of the prerogative of pardon would not, in my judgment, be more satisfactory to the public. But if a change is to take place, and the cases of prisoners are to be decided on the advice of Ministers, I can see no sufficient reason for making a distinction between this class of business and the ordinary business of Government. The Minister ought to inquire into and examine each case, and each case ought to be decided on his advice. The refusal of the Governor to accept his advice in any case of this kind ought to have the same significance and effect as a similar refusal in any other case. In no other way can the Minister be fairly responsible to Parliament for what is done. Either "the responsibility of deciding upon such applications" must still "rest with the Governor," as Lord Granville expresses it, or it must rest with the Minister in the only way in which it would be just to hold him responsible.

(Signed), HENRY PARKES.

Colonial Secretary's Office,
Sydney, May 30, 1874.

(No. 8.)

Minute by the Governor for the Executive Council.

I have read the Minute of the Honorable the Colonial Secretary upon the subject of Pardons, and it has occurred to me that the difficulty of dividing the responsibility in this matter, in the manner suggested by the late Secretary of State, can perhaps best be illustrated by showing how such a system would work in the practical transaction of business.

Hitherto the practice here has been for all applications for mitigation of sentences to be submitted to the Governor for his independent decision thereon. Some are sent to him direct through the post by the petitioners, others are presented personally by influential persons interested, whilst the remainder reach him through the Colonial Secretary's office, without any expression of opinion from the Minister. Taken altogether these applications are numerous. I have not kept any account of them, but I should think that a weekly average of twelve would certainly be below the number. All are carefully perused by the Governor. Some—in which the grounds stated, even if proved, would be insufficient to justify remission—are summarily rejected; others, upon which inquiry may seem desirable, are referred for the report of the Sheriff and the sentencing official, and sometimes the opinion of the Crown Law officers is asked for. Previous petitions and papers in each case (if any) are carefully perused, and eventually the Governor gives his decision, according to his own independent judgment. The papers are then sent to the Colonial Secretary's Office, where the necessary official steps are taken to carry the decision into effect, without, I believe, in ordinary cases, the matter being even brought under the notice of the Minister.

If a change such as has been suggested were to be carried out, the first question to be decided would be by whom should all petitions and applications for mitigation of sentences be considered in the first instance,—by the Governor or by the Minister?

If, as at present by the Governor, what would be the consequence under the instructions contained in the Secretary of State's Circular despatch of the 1st November, 1871? The words of that despatch are as follows:—

"The Governor, as invested with a portion of the Queen's prerogative, is bound to examine personally each case in which he is called upon to exercise the power entrusted to him, although, in a Colony under Responsible Government, he will, of course, pay due regard to the advise of his Ministers, who are responsible to the Colony for the proper administration of justice and prevention of crime, *and will not grant any pardon without receiving their advice thereupon.*"

The last few words which I have italicised are not quoted by the Colonial Secretary in his minute, but they are important as showing the precise view taken by the Secretary of State. The Governor apparently may, after personally examining any petition for mitigation, and after giving due weight to the advise of his Ministers, exercise an independent judgment and reject the application. He may say "No" on his own authority, but he can only say "Yes" on the advice of a Minister. The idea would seem to be to make the Governor and the Ministers mutually act as checks on each other. Either can negative a prayer for pardon, but both must concur before any such application can be granted. If, therefore, the petitions were considered in the first instance by the Governor, all cases rejected by him would at once be withdrawn from the cognizance or control of the Minister—a proceeding of which the latter might justly complain if any responsibility at all were to be imposed on him in this matter. In all cases in which the Governor proposed to mitigate the sentence his decision would have to be approved and confirmed by the Minister, who might, if he saw fit, veto the merciful intentions of the Governor. It appears to me the Governor and the Minister would occupy somewhat anomalous positions in such cases. Under a constitutional form of Government the Crown is supposed to accept or reject the advise of Responsible Ministers; in this matter the Minister would adopt or reject as he pleased the advise of the Representative of the Crown!

But suppose, on the other hand, that all petitions were considered and reported on in the first instance by the Minister, what would then be the result? Why, all cases rejected by the Minister need never be sent on at all to the Governor, to whom they would be addressed. For, as the Governor could not pardon without the advice of the Minister, there would be no object in troubling him with applications which he could not comply with. In cases in which the Minister advised mitigation, the Governor could, of course, if he saw proper, in the exercise of his "undoubted right," reject such advice—upon being prepared to accept the consequences. But practically, he would never do so, except in cases which, in his view, involved such a gross abuse of the prerogative that both the Secretary of State and local public opinion would be likely to support him in the adoption of extreme measures. In all ordinary cases in which neither Imperial interests nor policy were involved, the Governor, whatever his own private opinion might be, "would be bound to allow great weight to the recommendation of his Ministry, who are responsible to the Colony for the proper administration of justice and prevention of crime." Practically, under such a system, the prerogative of mercy would be transferred from the Governor to the Minister charged with such duties.

It was perhaps the recognition of some such difficulties which led to the suggestion of a compromise between these two systems, thrown out in Lord Kimberley's last despatch on the subject. In effect, his Lordship appears to suggest that the Governor might continue, as at present, to examine into and deal with all petitions for pardon, but that he should, before granting a mitigation of the sentence in any case, ascertain by means of informal consultation that the Minister concurred in such a step. I fear that such a plan would not work well, and that its effect would simply be to fritter away any real or clearly defined responsibility in such matters. In the first place, who would be responsible for the appeals rejected upon which charges of sectarian

partiality or official corruption might possibly be based? Is the Governor to remain responsible for refusals, and the Minister to become responsible for pardons? Again, if the Minister is to be responsible for pardons, he would have, unless his concurrence were a mere matter of form, to go through all the reports and papers in each case in which a pardon was proposed by the Governor, and, as I have before shown, he would have to place upon the papers in writing his final acceptance or rejection of the Governor's advice. If such grave matters were disposed of in informal conversations, such a loose mode of transacting business would inevitably result in mistakes and misapprehensions. The Governor might decide a case under the full impression that the Minister concurred in his view, and yet he might find subsequently that there was some misunderstanding, and that his decision was repudiated and condemned.

For these reasons I entirely concur in the conclusion arrived at by the Honorable the Colonial Secretary, in his Minute, that the responsibility for the exercise here of the Queen's prerogative of pardon, must either, as heretofore, rest solely with the Governor, or it must be transferred to a Minister, who will be subject in this as in the discharge of other administrative functions, only to those checks which the Constitution imposes on every servant of the Crown, who is at the same time responsible to Parliament. The real question at issue is thus brought within narrow limits.

The Colonial Secretary expresses "grave doubts whether any change at present from the system which has hitherto prevailed here will be beneficial to the Colony," and he thinks that under the circumstances existing here, the prerogative of pardon will be better exercised by the Governor than by the Minister. If the validity of such an argument were once admitted, it might, perhaps be held to extend to other branches of administrative business. But the very essence of the Constitution is responsibility to Parliament for the administration of local affairs; and possessing, as the system does within itself, a prompt and effectual means of correcting any abuse of power, there can be little doubt that political training and official experience will soon impose restraints upon those impulses which sometimes mar the earlier attempts at self-government.

I have felt, ever since my first arrival in the Colony, that the practice which has hitherto prevailed here, of entrusting an important branch of local administration solely to an officer who is not responsible to Parliament, is highly objectionable; and as I fail to see that any plan of divided responsibility in such a matter can be devised, I can only repeat here, what I have on several occasions since the receipt of Lord Kimberley's last despatch stated to the Colonial Secretary in conversation, namely, that I am quite prepared to adopt a change of system; and I think that for the future all applications for mitigation of sentences should be submitted to me through the intervention of a responsible Minister, whose opinion and advice, as regards each case should be specified in writing upon the papers.

(Signed), HERCULES ROBINSON.

Government House, June 1, 1874.

(No. 9.)

Minute of Executive Council.

June 2, 1874.

His Excellency the Governor lays before the Council a Minute by the Honorable the Colonial Secretary on the subject of the system of treatment of cases of petitions presented for the absolute or conditional pardon of convicted offenders; also, a Minute by his Excellency on the same subject.

2. The Council concur in the views expressed by the Honorable the Colonial Secretary and his Excellency the Governor in these Minutes, and advise that for the future all applications for mitigation of sentence should be submitted to his Excellency

through the intervention of a responsible Minister, whose opinion and advice, as regards each case, should be specified in writing upon the papers.

Approved.—H. R., 2–6–74.

(Signed), ALEX. C. BUDGE,
Clerk of the Council.

(No. 10.)

Minute Paper for the Executive Council.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, June 2, 1874.

Consequent upon the change in the system of treating the cases of convicted offenders, in view of the exercise of the prerogative of pardon, I recommend that in future all petitions and applications for mitigation of sentence or pardon be received, considered and submitted to his Excellency the Governor by the Minister of Justice and Public Instruction.

(Signed), HENRY PARKES.

(No. 11.)

Minute of Executive Council.

June 2, 1874.

His Excellency the Governor lays before the Council a Minute paper by the Honorable the Colonial Secretary, recommending, in consequence of the change in the system of treating the cases of convicted offenders in view of the exercise of the prerogative of pardon, that in future all petitions and applications for mitigation of sentence or pardon be received, considered and submitted to his Excellency the Governor by the Minister of Justice and Public Instruction.

2. The Council approve of the recommendation of the Honorable the Colonial Secretary, and advise that it be adopted accordingly.

Approved—H. R., 2–6–74.

(Signed), ALEX. C. BUDGE,
Clerk of the Council.

(No. 2.)

Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(*Received August* 31.)

(Extract.)

GOVERNMENT HOUSE,
SYDNEY, June 29, 1874.

In a public despatch by this mail I have forwarded to your Lordship a Parliamentary paper, showing the decision which has been come to in Executive Council as to the mode of exercising the prerogative of pardon in cases which are not provided for by the Royal Instructions, but I think it right, at the same time, to state fully in this confidential despatch all the circumstances which have occurred here, and which have led to the conclusion which has at length been arrived at on this subject.

When I assumed the Government of New South Wales in June, 1872, my attention was almost immediately attracted to this question by finding a number of petitions for mitigation of sentences submitted for my decision, without any opinion or advice endorsed on them by the Colonial Secretary, through whose hands they reached me. I was the more surprised at this because I was aware that such a course was unusual, even in a Crown Colony, where the Governor is assisted in forming a judgment by the opinion expressed as to the merits of each case by the Colonial Secretary or other member of the Executive by whom such cases may be submitted

for decision. Upon enquiry I was informed that it had been the practice here ever since the establishment of responsible Government for the Governor to dispose of all applications for mitigation or pardon, except in capital cases, without reference to Ministers. I was told that a correspondence had been going on with the Home Government for nearly three years on the subject, but that, the instructions received being thought to be conflicting, Sir A. Stephen had, a few days before my arrival, written fully to Lord Kimberley,* describing precisely the practice here, and enquiring whether it was thought desirable that a different course should be adopted. Although, therefore, I entertained grave doubts myself as to the propriety of the practice, I thought it better, as it had been in force for sixteen years, and was then under reference to the Secretary of State, to make no change until a reply was received to Sir Alfred Stephen's despatch.

When Lord Kimberley's answer reached me in May, 1873, I at once forwarded a copy of it to the Premier, for his consideration in connection with the previous correspondence on the same subject.† It appeared to me that this despatch, read in conjunction with the Circular despatch of 1st November, 1871,‡ was clearly condemnatory of the practice which had up to that time been pursued in New South Wales. Under that system the Governor alone could be considered responsible for the exercise of the prerogative of pardon in other than capital cases, whilst it was clear that Lord Kimberley considered the responsibility for decisions, which were so intimately connected with the proper administration of justice and the prevention of crime, should rest with Ministers, and not solely with the Governor, as heretofore. It seemed to me from the correspondence that the one thing which Lord Kimberley held to be indispensable was Ministerial responsibility; so long as this obligation was clear and acknowledged it was a matter of little consequence by what form of consultation it was arrived at.

I took the earliest opportunity, after the receipt of Lord Kimberley's despatch, of speaking to Mr. Parkes on the subject. I pointed out that the question so long under reference home had, at length, I thought been conclusively disposed of, and I expressed my readiness to initiate a system more in accordance with home views and constitutional principles whenever he was prepared to take up the question.

* * * * *

So the matter rested until about a month ago, when the attention of Parliament was attracted to the proposed release of the bush-ranging prisoners. The despatches as regards the exercise of the prerogative of pardon were then called for, and Mr. Parkes wrote his Minute of the 30th ultimo, which will be found amongst the published papers.§

Mr. Parkes' view as embodied in this paper was simply this: he preferred that the responsibility of deciding upon applications for mitigation of sentences should remain as heretofore, solely with the Governor; but if a change were insisted on, and the cases of prisoners were to be decided on the advice of Ministers, as required by the Secretary of State, he could see no sufficient reason for making a distinction between this class of business and the ordinary business of Government. In effect, he declined to accept any responsibility for Ministers unless they had, not only in form but in substance, a voice in such decisions.

I at once felt that it was impossible for me to accept Mr. Parkes' alternative of allowing matters to remain as they were. Such a settlement would have been opposed to the views of the Secretary of State, and it would have been instantly protested against by Parliament, as inconsistent with the principles of responsible government. The discussions which had already taken place in Parliament had shown beyond all question the necessity for some Minister being responsible for the pardons granted, as well as for those which might be refused. As instancing the necessity for ministerial responsibility in even the latter class of cases, I enclose a Parliamentary

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* Inclosure 5 in No. 1. † Inclosure 6 in No. 1. ‡ Inclosure 4 in No. 1.
§ Inclosure 7 in No. 1.

paper* which shows how charges of sectarian partiality and official corruption can be based on a refusal to entertain an application for mitigation. It will be obvious from a perusal of this paper how necessary it is that Her Majesty's Representative should be relieved from a position which exposes him to such imputations.

I accordingly felt no hesitation in closing with Mr. Parkes' other alternative, and deciding that for the future all applications for mitigation of sentences should be submitted to me through the intervention of a responsible Minister, whose opinion and advice, as regards each case, should be specified in writing on the papers. This is simply the mode in which all the ordinary business of Government is conducted, and I could see no sufficient reason for making any distiction in these cases. If the appointment of Judges and other prerogatives of like kind had been left to the Representative of the Crown, there might have been some grounds for retaining also in the same hands the exclusive exercise of the prerogative of pardon. But when everything else has been conceded to the responsible advisers, it seems too absurd to suppose that the question of letting out this or that criminal should be the one thing not entrusted to them.

* * * * *

In the present Constitutional stage it is obvious that as regards all purely local matters, Ministers must be trusted "not at all, or all in all."

It appears to me, too, that the plan determined on meets all the requirements specified in Lord Granville's and Lord Kimberley's despatches on this subject.† The papers in every case will be laid before the Governor for his decision. He will thus have an opportunity of considering whether any Imperial interest or policy is involved, or whether his personal intervention is called for on any other grounds. If there should be no such necessity he would, of course, as desired by Lord Kimberley, "pay due regard to the advice of his Ministers who are responsible to the Colony for the proper administration of justice and the prevention of crime."

Mr. Parkes, I think, pushes his argument against the change too far when he implies that the refusal of the Governor to accept the advice of the Minister in any case of pardon would necessarily involve his resignation. Of course, theoretically, such a view is correct, but I need scarcely point out, that in the practical transaction of business Ministers do not tender their resignations upon every trival difference of opinion between themselves and the Governor.

* * * * *

I trust that your Lordship will approve of the plan which I have adopted, with the consent of the Government, and the entire concurrence of Parliament, for dealing with applications for the mitigation of sentences in cases which are not provided for by the Royal Instructions. I may add, that I have learned since the matter was disposed of here, that the new system is, in effect, similar to the practice in force in the neighbouring Colonies. In New Zealand the practice, I am informed, is precisely similar to that now established in New South Wales; whilst in Queensland, South Australia, and Tasmania, recommendations for mitigations of sentences are brought before the Executive Council by a Minister, which, of course, places the responsibility for the decision arrived at directly upon the Government. As regards Victoria I have not as yet received a reply to an inquiry which I have addressed to Sir George Bowen on the subject, but I have been given to understand that the practice there is somewhat similar.

No. 3.

Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(*Received August* 31.)

GOVERNMENT HOUSE,

(Extract.) SYDNEY, June 30th, 1874.

In my despatch of the 5th instant, ‡ I stated that I would by this mail report

* Not printed. † Inclosures 3 and 4 in No. 1. ‡ Not printed.

fully to your Lordship all the circumstances connected with the proposed mitigation of bush-ranging sentences, which have given rise here to so much discussion, and I now proceed to carry out this promise.

In August, 1872, about two months after my first arrival in this Colony, a petition, marked A, addressed to me praying for a mitigation of the sentence passed upon a prisoner named Gardiner was sent into the Colonial Secretary's Office. The petition, which will be found in the accompanying Parliamentary paper, marked A, was supported by the signatures of former Ministers of the Crown, of members of Parliament, Justices of the Peace, Ministers of Religion, Members of the Bar, and altogether by the names of about 400 citizens. I do not ever remember receiving before a petition in favor of a prisoner so numerously and influentially signed.

And here I may observe that although at this time, as I have shown in another despatch, it was the practice in ordinary cases of petitions for mitigation of sentences simply to forward such application to the Governor for his independent decision upon them, the ordinary routine was not followed in this case, which was dealt with out of the usual course. The petition, which was sent in to the Colonial Secretary's Office in August, did not reach me for nearly four months, and the following action was, in the interval, taken upon it.

On the 12th August, 1872, the petition and accompanying papers were referred by the Colonial Secretary to the Sheriff and Comptroller-General of Prisons for his report. On the 12th September that official reported on them. His minute was to the effect that the decision in Gardiner's case would be of unusual importance, as it would necessarily be a guide in numerous other cases of a similar character; that it was probably never contemplated that Gardiner should serve his full sentence; and that as the crime of bush-ranging had been practically suppressed, the time was favourable for making a mitigation in his case, as well as in the other cases of like character. In conclusion the Sheriff suggested in effect that the case of Gardiner might with propriety be disposed of by granting him a conditional pardon at the end of ten years' imprisonment in gaol, the condition contemplated being that specially authorised by Clause 4 of the Local Enactment, 11 Vict., cap. 34, a copy of which is annexed, marked B.

On the same day, the 12th of September, this Minute was read by the Colonial Secretary, who ordered it, together with all the other papers in the case, to be referred to the Chief Justice for his report, an order which was carried out by a letter from the office, dated 17th September, 1872.

Three days later, on the 20th September, the Colonial Secretary wrote the following Minute, which was transmitted to the Sheriff for his guidance :—" I have spoken to the Chief Justice on the subject of the sentences of the men convicted of the crime of bush-ranging at and about the time of Christie's conviction. I concur in a suggestion made by Sir Alfred Stephen, that the Sheriff prepare a statement of each case, showing age, previous character, number of offences, sentence, conduct in gaol, and other particulars, with a view to the consideration of all the cases."

Thus it will be seen that before any paper in this case had been even laid before me, the Colonial Secretary was acting as if the Sheriff's suggestion in his Minute of the 12th September, 1872, as to Gardiner's release, was approved of, as he called for a report on the other cases referred to in that Minute, and which the Sheriff had pointed out were dependent on the decision in Gardiner's case. Such a proceeding appears to me fairly to imply that the Colonial Secretary was at that time personally favourable to the recommendation of the Sheriff for Gardiner's conditional release.

Two months later, on the 30th November, 1872, the Chief Justice sent to the Colonial Secretary a report on the petition, in which he declined, for the reasons stated, to incur the responsibility of advising a mitigation in Gardiner's case.

A few day's later, that is, on the 4th December, 1872, the Colonial Secretary, for the first time, laid the petition before me, with the reports on it which he had procured from the Sheriff and Sir Alfred Stephen, together with a statement from the principal gaoler, showing the particulars of Gardiner's sentence, his previous conviction and prison history. In submitting these papers, Mr. Parkes accompanied

them with a Minute of his own in which he specially pointed out to me (as if counterbalancing the unfavourable report of the Chief Justice) the names of the gentlemen of position and respectability who were in favour of a mitigation of Gardiner's sentence.

Shortly before this the Colonial Secretary had prepared me in conversation for the reception of such an application, and had stated verbally all the circumstances of Gardiner's case and the altered condition of the country as regards the practical extinction of the crime of bush-ranging. After I had perused the papers, and before I had come to any decision on the case, I had an opportunity of again conversing on the subject with Mr. Parkes; and although he offered no formal Ministerial advice (such a course being unusual, except in capital cases,) the facts that he laid before me appeared to lead to but one conclusion, namely, that the time had arrived when the case of the prisoner Gardiner might with both safety and propriety be viewed with merciful consideration.

Acting on this view, in the correctness of which after full consideration of the case, I entirely concurred, I gave the following decision which I endorsed on the papers under date 5th December, 1872: "When the prisoner has served ten years his case may again be brought forward. If his conduct should in the meantime be good, I should feel disposed to grant him then a pardon, conditional on his leaving the country. At present I do not concur with the Petitioners that the sentence which the prisoner has undergone is sufficient for the ends of justice." This decision was at once transmitted by me to the Colonial Secretary, who conveyed it by letters from his office, dated the 10th December, to the Chief Justice, the Sheriff, and the Petitioners; and I may here remark that neither then, nor at any subsequent time, did I ever hear from the Colonial Secretary one word to lead me to suppose that he did not cordially concur in the propriety of my decision.

And here it will perhaps be convenient that I should interrupt my narrative of more recent events to give a brief account of Gardiner's criminal career. In March, 1854, he was convicted at Goulburn of horse stealing and sentenced to fourteen years on the roads. In December, 1859, after five years' imprisonment, he obtained a ticket-of-leave for Carcoar district, which ticket was cancelled in May, 1861, on the grounds of absence from the district, and suspicion of cattle stealing. A reward was offered for his apprehension, and two constables, Middleton and Hosie, hearing that he was living in an isolated farm hut in the bush, visited the place unexpectedly on 16th July, 1861, and surprised Gardiner in an obscure inner room, from which there was no outlet except by the door at which they stationed themselves. Gardiner resisted, pistol shots were exchanged, Middleton and Hosie were both wounded, but Gardiner was eventually captured and handcuffed. Middleton then left for the nearest village, which was many miles distant, to obtain assistance, and during his absence Gardiner escaped;—Hosie asserting that he had been rescued by some bushrangers, with whom Gardiner was supposed at that time to be associated, but it is generally believed now that Hosie was bribed, and connived at the escape.

During the twelve months that followed this escape, Gardiner was supposed to be the ringleader of a gang of bushrangers, and to be constantly engaged in depredations of that character. He was a remarkable criminal in many ways, but certainly not for his atrocity as compared with others. It is stated that, through accident rather than design, it so happened that throughout his whole career of bushranging he never took life, and he was always noted for gentleness and respect for women, never allowing them to be insulted or attacked when he was present. He was no doubt a terror to the well-disposed portion of the community, and his example was most pernicious, for being looked on by many as a sort of hero, in consequence of his activity and feats of daring, he made bushranging, as it were, fashionable and attractive, and a number of foolish youths were led to follow in his footsteps. It is supposed that it was Gardiner who planned and directed the gold escort robbery in June, 1862, when the police in charge were fired on and driven into the bush. Some 3,000 ounces of gold were captured, of which about 1,700 ounces were subsequently recovered, the rest remaining with the captors. Immediately after this Gardiner

disappeared, and was not heard of for two years, when he was discovered by the police in the interior of Queensland, where he had in the interval been leading, it is asserted, a quiet and industrious life, engaged in occupations which were entirely free from crime. He was brought to Sydney to stand his trial, which took place in July, 1864. It was then found by Sir James Martin, the Attorney-General, that there was no evidence forthcoming to connect Gardiner with the escort robbery, or with any of the serious bushranging cases with which he was supposed to have been connected; and he was put on his trial eventually for wounding Middleton and Hosie, with intent to kill (in this Colony a capital offence), when they attempted to capture him in July, 1861, on the cancellation of his ticket-of-leave. The jury, however, were not satisfied that Gardiner in defending himself, as it were, against the sudden attack of these men in an almost dark room, knew that they were constables, and acquitted him of the capital charges, finding him guilty of the minor count of wounding Hosie with intent "to do grevious bodily harm." Gardiner was tried at the same time for robbing two travellers, Hessington and Hewett, being armed (an ordinary case of bushranging, unaccompanied by any aggravating circumstances), to which he pleaded guilty; and for these convictions he was sentenced by the late Chief Justice to 32 years imprisonment, the first two years in irons. The condition of the country at the time called perhaps for exceptionally severe sentences—the community being almost paralyzed with fear. But it is impossible when now reviewing dispassionately all these circumstances to resist the conviction that Gardiner's cumulative sentences were measured not only with reference to the crimes of which he had been convicted, but in view also of those with which he was supposed to have been connected, and of the charges of which he had been acquitted.

I will now revert to the circumstances connected with the mitigation of the bushranging cases, detailing them in the order in which they occurred. Shortly after my decision in Gardiner's case had been communicated to the Sheriff he proceeded to act on the instruction contained in the Colonial Secretary's Minute of 20th September, 1872, and which he had allowed to remain in abeyance pending a settlement of Gardiner's case. On the 21st January, 1873, the Sheriff addressed to the Colonial Secretary a General Report, marked D, on the cases of the prisoners serving long sentences for bushranging who still remained in gaol, and whose cases he thought called for serious consideration. These sentences, he pointed out, had been imposed at a period when it was thought necessary to deter from the commission of crime of that particular character by severe examples of punishments, but the remarks of the judges when passing sentence, and the action of the Executive subsequently had led the prisoners of this class generally to expect that their sentences would not be served in full, but that when the crime of bushranging had been as it were stamped out, the punishment awarded during that period of excitement would be carefully reconsidered. The Sheriff pointed out that of the bushranging cases convicted from 1860 to 1870, no less than 47 had been already commuted. In almost all these cases, the favourable report of the Judges had been received—thus showing that the Judges generally looked to a shortening of these bushranging sentences by the Executive, and justifying the expectations entertained by the remaining prisoners on the subject.

The desultory manner in which the 47 cases referred to had been dealt with had been productive of much harm. They were mostly decided upon applications from the relatives and friends of prisoners, and upon no fixed principle or rule whatever. This will be apparent from a glance at the accompanying return, marked E,* called for by Parliament, showing the particulars of 267 remissions sanctioned during the five years ending 31st December, 1873, and which includes nearly all the 47 remissions in bushranging cases referred to by the Sheriff. The manner in which these 47 cases had been disposed of had created a strong feeling of injustice and unequal treatment amongst the prisoners of the same class that remained in gaol, to the serious prejudice of prison administration. The Sheriff stated to me that he scarcely ever

* Not printed.

entered the gaols that prisoners did not lay before him their cases, which compared favourably with those of men who had been released whilst they remained in prison.

The Sheriff accordingly recommended that, instead of continuing to treat these cases individually, they should be dealt with collectively with a view to equality of treatment, as far as circumstances would permit, a consideration which should always have a first place in prison administration. He submitted a scale of reductions which he thought would meet the cases generally, excepting, however, from its operation cases in which life had been taken, the cases of old offenders, and others presenting specially unfavourable circumstances. This suggestion was laid before me by the Colonial Secretary without remark, and I eventually, after a slight modification of the scale, concurred in the proposal, endorsing on the papers the following Minute, under date 5th June, 1873:—"I think, with this amendment, the cases of the prisoners referred to might be dealt with in the general manner recommended by the Sheriff, each case being submitted with a separate Report from the Sheriff as to whether there are any circumstances in connection with it which render it undesirable to apply to it the general regulations in the accompanying letter of the 21st of January." This decision was initiated by the Colonial Secretary as seen by him on the 10th June, 1873, and in the following October the Colonial Secretary submitted to me the special recommendations of the Sheriff in 23 cases based on the general scale of reduction already sanctioned. Full particulars of these cases, with the precise mitigation in each case of which I approved, will be found in the return which which accompanies inclosure D before referred to.

Thus, it will be seen, that although Gardiner's case, and those of the other 23 bushrangers, were disposed of at a time when, for the reasons explained in another despatch, the exercise of the prerogative of pardon in other than capital cases, was understood to rest with the Governor; these cases were dealt with out of the usual routine. They were, as I have shown, the subject of much correspondence, which originated with the Colonial Secretary; and all subsequent communications passed through his hands. The cases, too, were eventually decided in precise accordance with the recommendations of the permanent head of the Prison Department, which were submitted to me by the Colonial Secretary, who was supposed, from the absence of any statement to the contrary, to concur entirely in the views and proposals of his subordinate officer.

So the matter rested until about two months ago, when a question was asked in Parliament as to the proposed liberation of Gardiner. Mr. Parkes' answer not being considered satisfactory by the questioner, the adjournment of the House was moved, and a debate ensued, which will be found reported in the accompanying copy of the *Sydney Morning Herald* of the 30th April last.*

* * * * * *

As soon as the question was disposed of in Parliament, several petitions, some of them largely signed, were presented to me, one being in favor of keeping faith with Gardiner, and the others deprecating any mitigation of his sentence. I found that Ministers, after the defeat of the adverse Resolutions in the House, did not propose to offer me any advice, but wished to leave me quite free to exercise my own unbiassed judgment as to whether the decision which had been come to in December, 1872, as to Gardiner's case ought or ought not to be adhered to. I accordingly considered very carefully whether any fresh facts had been brought to light by the public discussion of the question which would justify me in disappointing now the expectations which I had raised when Gardiner's case was first brought before me about eighteen months ago. Before coming to any decision I had a long conversation on the subject with the present Chief Justice, Sir James Martin, who having been Crown Prosecutor when Gardiner was convicted, was thoroughly conversant with all the circumstances of the case, and the condition of the country at that period of excitement. I found that Sir James Martin was very decidedly of opinion—(1) that Gardiner's sentence was excessive for the offences for which alone he had been convicted; (2) that he

* Not printed.

had now been sufficiently punished; and (3) that he might be released even in Sydney without any substantial danger. As I myself entertained precisely the same views, I embodied my reasons for adhering to my former decision in a Minute for the Executive Council, marked R, and the Council concurring in my conclusion, the case may now be considered as finally decided and disposed of.

On the whole, I am disposed to think that the agitation which has been got up about this case will do good. It has already served to call attention to the mode of exercising the prerogative of pardon in ordinary cases, which has in consequence been placed on a proper footing. I trust also that it may have the effect of making the public here investigate more closely the principles which should govern the punishment and treatment of criminals. The paper marked E which accompanies this despatch, discloses some startling facts. It shows that the mitigation by the Executive of judicial sentences upon no settled system whatever has been here not the exception, but the rule. This, of course, is quite contrary to all the recognized principles of modern criminal treatment under which prisoners as a rule should only receive such remission of their sentences as they may themselves be able to earn under the established good conduct regulations. But Executive interference will necessarily take place when judicial sentences are excessive or wanting in uniformity. This subject was ably discussed in 1867 in a Minute by Lord Lisgar (then Sir John Young), in which he pointed out the excessive severity of the sentences passed in this Colony as compared with those usually awarded in the British Islands; and he characterized the punishments imposed here in cases of a certain character as "cruel and oppressive, and, under all the circumstances of the country, beyond all the measure of justice or reason." I enclose a printed copy of this Minute marked S which was quoted in the recent debate.

Inclosure 1 in No. 3

(A.) 1873-4.

LEGISLATIVE ASSEMBLY.—NEW SOUTH WALES.

Gardiner alias *Christie.*—(*Correspondence relating to Applications for Mitigation of existing Sentences.*)

Ordered by the Legislative Assembly to be printed, May 12, 1874.

(No. 1.)

Petition of Mesdames Griffiths and Cale.

To His Excellency Sir Hercules George Robert Robinson, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Governor and Commander-in-Chief of the Colony of New South Wales and its Dependencies, and Vice-Admiral of the same.

The humble Petition of Archina Griffiths, wife of Henry Griffiths, York Street; and Charlotte Deacon Cale, wife of Joseph Cale, King Street,—

Sheweth :—

That your Petitioners' brother (Francis Christie) was apprehended in February, 1864, and tried at the Criminal Court of Sydney, on the 8th July, before his Honor the Chief Justice, and convicted on the following charges :—For shooting and wounding Trooper Hosie he was sentenced to fifteen years (the first two in irons) with hard labor; and for robbing Messrs. Hewett and Horsington he received two cumulative sentences, ten and seven years, making a total of thirty-two years of hard labour.

Your Petitioners humbly implore your Excellency's merciful consideration of their unfortunate brother's case, toward affording a remission of his terrible sentence, on the following grounds :—

1st. Previous to his apprehension he was obtaining his living as a storekeeper in Queensland for nearly two years, having abandoned his former career of wickedness, and had left the Colony, fully determined to lead a life of honest industry. Proofs of the good character he had gained could have been produced at his trial; and it is well known that gold, both by escort and private individuals, has been placed under his care with confidence and safety during that time.

2nd. That only four months after his conviction there was a desperate outbreak of prisoners in the gaol, in which he took no part whatever. His conduct on that occasion was so noticed by the Inspector-General of Police that he assured the prisoner that he would see the Colonial Secretary (Mr. Foster) and have a record of it made for the future benefit of the prisoner. To this record your Petitioners would humbly refer your Excellency, the late Dr. West having told the prisoner that it had been made.

3rd. That the prisoner has assiduously endeavoured to make himself as useful as possible in the work appointed for him, and has invented a contrivance which has greatly improved the making of the selvage on the matting, which was previously very defective and much complained of.

4th. That the prisoner has always given every satisfaction to the Sheriff as well as the Governor of the Gaol, and other officers and overseers, during the whole time, now the ninth year of his imprisonment.

5th. That your Petitioners beg also humbly to direct your Excellency's attention to the fact that his Honour the Chief Justice has more than once publicly remarked that although during the time there was so much bushranging he should always inflict the severest penalty of the law, nevertheless, we might perhaps be permitted respectfully to suggest that your Excellency would not be unwilling to exercise your prerogative of mercy, now the crime of bushranging has been happily and effectually suppressed.

6th. That the prisoner's health has already suffered so much from his long confinement as to cause him to be almost constantly under the hands of a doctor for disease of the heart and other serious symptoms, which have obliged him for a time to be placed in the hospital of the gaol, and have totally incapacitated him from continuous work.

Lastly. That your Petitioners feel certain that if your Excellency be pleased to grant him a pardon, he will thus be afforded the opportunity of redeeming the past; and from your Petitioners' knowledge of his character, they can confidently assure your Excellency that they believe he will never again commit himself; and from the very confident and feeling manner in which his Honour Sir Alfred Stephen has on many occasions addressed himself to Petitioners' brother, and remarked upon his reformation, they hope that he will recommend the prayer of this Petition to the most favourable consideration of your Excellency.

Praying the Lord may guide to a wise and judicious conclusion in disposing of this Petition, your Excellency's Petitioners, as in duty bound, will ever pray, &c., &c

(Signed), ARCHINA GRIFFITHS.
" CHARLOTTE DEACON CALE.

We, the Undersigned, beg most respectfully to recommend the foregoing Petition * to your Excellency's merciful consideration, the more especially from the desire to reform evidenced by the prisoner before capture, and his conduct since his incarceration, and trust that your Excellency may be pleased, under all the circumstances of the case, to deem the period of sentence already expired sufficient for the ends of justice.

(Signed), WILLIAM B. DALLEY.
" RICHARD DRIVER.

* This Petition received about 400 signatures.

Having been referred to in a petition for the mitigation of the sentence of Francis Christie, as holding the office of Colonial Secretary when an outbreak occurred in Darlinghurst Gaol, we have much pleasure in testifying to the fact of Christie's good conduct on that occasion, as well as to his general conduct during the entire period of his incarceration, so far as it came under my notice in either case. We are glad to record this opinion, so that it may operate as it ought in the prisoner's favor. And so far as these and other circumstances mentioned in the petition entitle his case to the favorable consideration of the Government, we are willing to add our testimony and recommendation.

(Signed), WILLIAM FORSTER.
" RICHARD HILL.

December 29th, 1871.

For about fourteen years I have been medical attendant on the family of Francis Christie, and have frequently visited him since his confinement in Darlinghurst, and during my last three visits I was glad to observe that he was greatly changed for the better, having entirely lost that peculiar ferocity of character which characterised him immediately after his capture in 1864; and it is my opinion that he is now completely recovered from his evil ways, and that it would be perfectly safe to permit him to go at large.

(Signed), A. MOFFITT,
Physician, &c.

135, CASTLEREAGH STREET, January 5th, 1872.

Sometime since I visited Darlinghurst Gaol, and had a long conversation with the prisoner Christie, which has fully convinced me he deeply regrets the great wrongs he has done. Under this belief, and considering the long period he has been incarcerated, I am induced to sign this petition in his favor, and which I trust will be successful.

(Signed), JOSEPH ECKFORD.

THE OSBORNE, SYDNEY, January 10th, 1872.

J. J. JOSEPHSON,
Macquarie Street.

JAMES SUTTON,
Dowling St. & Moore Park,
(*One of the Jury*).

Some years ago, whilst Christie, or Gardiner, was residing at Apis Creek, in the Colony of Queensland, keeping a roadside accommodation house for travellers, we were travelling that way in company with Mr. Keen, and on our return had occasion to want some flour from a dray which we met on a road; the driver refused to sell, urging that it belonged to Christie; in about half an hour after Christie made his appearance, and inquiring after his dray we mentioned the fact, when he immediately rode on and ordered some to be sent to us. From inquiries his conduct caused us to make, we learned that his conduct was civil and obliging, and that he was always willing to help or serve any traveller.

Since his long incarceration, we have made it a part of our duty to continually inquire of his behaviour and general deportment, and have found it to be good. Under

these circumstances, and believing that when we saw him at Apis Creek he was a good member of society, we have now no hesitation in recommending the prayer of the petition.

(Signed), E. S. HILL.
" G. HILL.

(No. 2.)

Minute of the Sheriff.

Francis Christie, *alias* Clarke, *alias* Gardiner.

In returning the petition in this case with the usual particulars of conviction, I have thought it desirable to accompany the same with a special report from the principal gaolers (herewith enclosed) upon the conduct and services, together with a report from the visiting surgeon, respecting the health of the prisoner.

Having regard to the prominence of prisoner's career, the circumstances attending the offences of which he was convicted, and the great length of his sentence (thirty-two years), the dealing with this case is of unusual importance, in respect of its bearing upon those of numerous other prisoners serving long sentences for offences of a similar character imposed during the prevalence of bushranging, who will form expectations or modify their hopes of commutation according to the decision that may be arrived at.

There is in the minds of those prisoners an expectation, founded partly upon the remarks of the judges when passing sentences, and partly upon the action of the Government in reductions made in some of the sentences referred to, that such sentences are not intended to be served in full, or even up to the periods of remission provided by the regulations. And if this view is to be entertained, it is desirable that the subject should be considered, and this and the other cases alluded to dealt with under a general idea of reduction of terms of sentence, modified in each case by the circumstances and the prison career of the prisoner; the greater proportionate reduction being allowed in the longer sentences according to the principle laid down in the Remission Regulations.

It probably was never contemplated that this prisoner should serve the full period of his sentence; and as he has now served eight years and the crime of bushranging has been practically abated, the time for making any limitation would not seem to be unfavourable. This remark applies to the other cases in the same category. Such a course would tend to settle the minds of the prisoners concerned, and give them encouragement in reformation of conduct and industry.

In the cases of the prisoners referred to, the granting of additional pardons (to exile) would in many respects be more desirable than the granting of actual remissions, and would admit of cases being dealt with at earlier periods, and without so apparent an interference with the ordinary operation of the Remission Regulations. The release of a prisoner under a conditional pardon is not open, as regards its effect on the criminal class, to so strong objections as his release in this Colony, wherein he might return to his former neighbourhood.

If any reduction be made in the sentence of this or any other similarly situated prisoner, I would suggest that it be made so that he could earn remission according to the regulations upon the reduced period, in order not to withdraw the incitement to good conduct and industry; thus, were his sentence reduced to twenty or fifteen years, that he could earn a further reduction of one-fourth. A conditional pardon granted after a service of ten years, would be about equivalent to the reduction of a sentence to fifteen years on the terms above mentioned. The advantage to the prisoner indeed would generally be with the latter.

(Signed), HAROLD MACLEAN.

Principal Under-Secretary, B.C.
September 12th, 1872.

(Inclosures.)

PARTICULARS of Conviction and Prison History of Francis Clarke, a prisoner in Darlinghurst Gaol, petitioning for Remission of Sentence.

Name of prisoner	Francis Clarke, *alias* Christie, *alias* Gardiner.
Birth-place and age	New South Wales, 43.
Convicted ... Where	Sydney Criminal Court.
Convicted ... When	4th and 8th July, 1864.
Offence	Wounding with intent to do grievous bodily harm and robbery, being armed—two offences.
Sentence	15 years roads, first two in irons; 10 years roads, at expiration of first sentence, and 7 years roads at expiration of second sentence (in all, 32 years).
Judge	Chief Justice.

PREVIOUS CONVICTIONS.

Where.	When.	Offence.	Sentence.
As Francis Clarke, Goulburn Circuit Court ...	March 17th, 1854...	Horse-stealing.....	14 years roads.

PRISON HISTORY—MARKS.

In the Gaol at—	Period.		Total No. of Days.	Orderly.	Industrious.	Disorderly.	Idle.	Sick.*
	From	To						
Darlinghurst.....	Jan. 1st, 1866...	Aug. 20th, 1872.	2,423	2,423	2,016	.....	.....	407

* Sick—Sundays and Holidays, 407.

PUNISHMENTS.—None.

General conduct in gaol very good, and sets a good example to others in every way.

(Signed), J. C. READ,
Principal Gaoler.

DARLINGHURST GAOL, August 21st, 1872.

DARLINGHURST GAOL,
August 21st, 1872.

Memo.—The prisoner referred to in this petition has been in hospital twice since I took medical charge in 1866, viz., once for two days for diarrhœa, and once for four days for a bilious attack. He has some degree of enlargement of the heart, rendering him unfit for very hard work (such as working at the loom); his appetite is variable, and he does not sleep very well. There is no other organic derangement than that of the heart.

(Signed), ISAAC AARON,
Visiting Surgeon.

I would like to have from the Principal Gaoler in this case a special report as to the conduct of this prisoner, beyond the character in the printed form

I would further be glad to have Mr. Read's report on the alleged action of the prisoner on the occasion of the outbreak referred to in the petition, and the value of the service rendered by him in improving the mat-making machinery; and, on the other hand, the circumstances attending the attempt on behalf of himself and the prisoner Cust to compass an escape by means of friends outside the prison, which occurred early in prisoner's confinement.—H.M., 27th August, 1872.

DARLINGHURST GAOL,
SYDNEY, 31st August, 1872.

SIR,—With reference to statements in the accompanying petition in favour of the prisoner named in the margin, I do myself the honour to state that the contrivance for improving the selvage of the matting therein alluded to was the invention of the prisoner. It is now in use, and very effective. The matting was certainly wanting in finish until this addition was made to the looms, and many customers complained of its faulty make, and would probably have obtained their supplies elsewhere had not this improvement been introduced.

As regards the prisoner's conduct on the occasion of the outbreak, 1st November, 1864, I must say he did not take any part in that desperate attempt, and, as far as I can learn, discouraged the proceeding, thereby incurring some annoyance from his fellow-prisoners, who looked to him as a leader. He was considered, both inside and outside the gaol, the leader of all bushrangers, and at the time a great many of that class were commencing long sentences. As a rule, his conduct has been good and exemplary; there is, however, one exception, that was in November, 1864, when he with another prisoner (Cust) opened communication with their friends outside with a view to effect their escape; in this they were assisted by a warder, who was dismissed for attempting to carry a letter out of the gaol for the prisoner's friends.

Since that time I have not had occasion to find fault with prisoner's conduct in any way.

I have, &c.,

(Signed), J. C. READ,
Principal Gaoler.

(No. 3.)

Minutes of Principal Under-Secretary and Colonial Secretary.

May be referred to his Honour the Chief Justice for report.—Sept. 12–72.
The Chief Justice.—H.P., 12–9–72.

(No. 4.)

The Principal Under-Secretary to the Chief Justice.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, 17th September, 1872.

SIR,—I have the honor to request the favour of your report upon the accompanying petition for mitigation of the sentence of thirty-two years' hard labour on the roads passed by you upon the prisoner named in the margin.

I have, &c.,
(For the Under-Secretary),

(Signed), WILLIAM GOODMAN,

(No. 5.)

The Chief Justice to the Colonial Secretary.

Supreme Court, 30th November, 1872.

Sir,—I have attentively read, and maturely considered, all the petitions in Gardiner's favour, with the recommendations attached to them; as also the reports of the Head Gaoler and Surgeon, and the very judicious remarks of the Sheriff, in his capacity of Inspector of Prisons. I have seen one or both of the prisoner's sisters, who are the principal petitioners, and the persons to whom he is indebted for the numerous signatures which are before me. I have also more than once, although not of late, seen Gardiner, and personally received representations from him. And I feel deep sympathy for those affectionate relatives, who are, I believe, respectable members of society. I moreover think it probable that Gardiner's desire to abstain from evil, if he were released, and as far as possible to induce others to abstain, is sincere, and perhaps may be permanent. But, remembering what I do of his whole career, what his past character and his crimes have been, and the notoriety which these have acquired, as well as the widely spread mischief which his leadership and tutoring for so many years occasioned, I dare not incur the responsibility of advising any mitigation in his case. I do not mean that none should at any time be granted; but the end and objects of all punishments are, first, the preventing of the individual, and secondly, the deterring of other individuals, from the committing of similar offences. And I am satisfied from long experiences and observation, that the particular crime of bushranging—with its frightful loss of life and property, and the insecurity of both which is entailed, with its attendant terrorism,—has been reduced to its present dimensions and state, solely by the rigorously severe punishment (in which I include the deaths of some of the criminals by the police, as well as by the Courts of Justice), inflicted upon the perpetrators. In several instances, no doubt, the penal serviture punishments have been mitigated, as the crime itself has gradually diminished in frequency. But I am compelled by a sense of duty, in this case peculiarly irksome, to point out, that of Gardiner's companions two or three have been executed for crimes in which he participated; that for the shooting both of Constable Hosie and Sergeant Middleton he himself narrowly (and most unrighteously) escaped a capital conviction; and that, of the thirty-two years to which he was justly sentenced, he has as yet barely endured one-fourth.

I am, &c.,

(Signed), ALFRED STEPHEN.

His Excellency.—H.P., 4–12–72.

In forwarding this petition (in the case of the most remarkable criminal that has appeared of late years in this Colony), I think it right to point out some of the minutes and signatures in his favour.

Names only:—

The Hon. W. B. Dalley.
R. Driver, M.P.
Richard Hill, M.P.
J. J. Josephson.
James Sutton, late Mayor of Sydney.
George Hill, J.P.

Minutes by—

William Foster, Esq., M.P., formerly Colonial Secretary.
Dr. Moffitt.
Joseph Eckford, late M.P.
Edward Smith Hill, J.P.

H.P., 4–12–72.

When the prisoner has served ten years his case may again be brought forward. If his conduct should, in the meantime, be good, I should feel disposed to grant him then a pardon, conditional on his leaving the country. At present I do not concur with the petitioners that the sentence which the prisoner has undergone is sufficient for the ends of justice.—H.R., 5–12–72.

(No. 6.)

The Chief Justice to the Colonial Secretary.

In re Gardiner's Petitions for Mitigation.

Supreme Court, 6th December, 1872.

My Dear Colonial Secretary,—I have received a letter (one only of several) from one of Gardiner's sisters, which I think ought to accompany the papers, with a copy of my reply. I therefore inclose both, begging you to submit them with the petitions to His Excellency. Or, if the case is already disposed of, I solicit the favor of your directing the present inclosures to be placed with them.

I have abstained from saying anything about Gardiner's career before his bush-ranging began, but I can add his previous history if desired. If my sentence on him for horse-stealing, passed at Goulburn, had not been interfered with, he would have had no opportunity of commencing cattle-stealing at Carcoar, or of robbing the Gold Escort afterwards; for the latter was committed before that sentence had expired.

I am, &c.,

(Signed), ALFRED STEPHEN.

To His Honour Sir Alfred Stephen.

(Inclosures.)

December 4, 1872.

Sir,—Again I place before you the one earnest wish of my anxious heart, in the hope that you will once more extend your mercy to my dear brother, Francis Christie. Oh, forgive him, for the sake of those who so earnestly plead for him, forgive him, as I hope the Great Judge of all may forgive you and yours when you plead for it. Mercifully grant him his liberation in the Colonies, so that his sisters may draw him nearer them and farther from danger. Could you know how we have waited and watched for your answer to our petition—an answer which seems so long delayed—you would have spared us, I believe, some of the anxious suspense; but if the answer be what we could wish, how little will the past misery seem compared to the boon ultimately granted. I know, your Honor, that my brother's sins have been many. I do not wish to think his sentence was unjust, but his punishment has been great and his reformation genuine, and may God grant that it may be your will to again restore my dear brother to freedom. With you his liberation or endless imprisonment rests, so far as earthly power rules; therefore, be that answer what it may, to you, Sir Alfred Stephen, I must look. Be merciful when you would look at the darkest side of this man's character, and forgive me for taking the liberty of writing to you as I have done. Trusting that you will pardon my presumption,

I remain, &c.,

(Signed), A. GRIFFITHS.

Supreme Court,
December 6, 1872.

The Chief Justice has read with deep sympathy the several letters which he has received from Mrs. Griffiths and her sister, and he will forward her letter of yesterday

to His Excellency the Governor. The Chief Justice is quite willing to believe all that is represented in Christie's (otherwise Gardiner's) favour; but he feels bound to remember the notoriety of the prisoner's bushranging crimes, and their number, and the frightful evils to which they led, including the deaths of many persons, and the execution of two young men for acts in which Gardiner was the ringleader. Nor can it be forgotten that of the thirty-two years of his sentence one-fourth even has not yet elapsed.

The Chief Justice cannot, therefore, undertake the responsibility of recommending any mitigation in the case. But he does not admit that any such responsibility ought to be cast upon him. It is peculiarly a question for the Governor and Executive Council; and if they should think it right at some future period to remit any portion of the sentence, Sir Alfred Stephen, as an individual, would, for the sake of petitioners, be glad to hear of the decision.

His Excellency.—H. P., 7–12–72.

I have already decided to grant a conditional pardon at the termination of ten years' imprisonment.—H. R., 7–12–72.

(No. 7.)

The Principal Under-Secretary to the Chief Justice.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, 10th December, 1872.

SIR,—In acknowledging the receipt of your report of the 30th ultimo, on a petition in favor of the prisoner named in the margin, praying for a mitigation of the sentences, amounting to thirty-two years' hard labor on the roads, passed on him at the Central Criminal Court, on the 4th and 8th July, 1864, for wounding with intent to do grievous bodily harm and robbery, two offences, being armed, I am directed by the Colonial Secretary to inform you that His Excellency the Governor has been pleased to approve of the prisoner's case being brought forward for consideration when he shall have served ten years of his sentence.

2. I am further desired to state that, if the prisoner's conduct should be in the meantime good, His Excellency would feel disposed to grant him a pardon, on condition of his exiling himself.

I have, &c.,

(Signed), HENRY HALLORAN.

(No. 8.)

The Principal Under-Secretary to the Sheriff.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, 10th December, 1872.

SIR,—Referring to the petition in favor of the prisoner named in the margin, praying for a mitigation of the sentences, amounting to thirty-two years' hard labor on the roads, passed on him at the Central Criminal Court, on the 4th and 8th July, 1864, for wounding with intent to do grievous bodily harm and robbery, two offences, being armed, I am directed by the Colonial Secretary to state, for your information and guidance, that His Excellency the Governor has been pleased to approve of your bringing the prisoner's case forward for consideration when he shall have served ten years of his sentence.

2. I am further desired to state that, if the prisoner's conduct should be in the meantime good, His Excellency would feel disposed to grant him then a pardon, on condition of his exiling himself.

I have, &c.,

(Signed), HENRY HALLORAN.

(No. 9.)

The Principal Under-Secretary to Mrs. Archina Griffiths and Mrs. Charlotte Deacon Cale.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, 10th December, 1872.

MESDAMES,—I am directed by the Colonial Secretary to inform you that the petition received from you in August last, in favor of your brother, the prisoner named in the margin, at present serving a sentence of thirty-two years hard labor on the roads, has been duly laid before His Excellency the Governor, and that, when the prisoner shall have served ten years, instructions have been given to the Sheriff to bring his case forward again.

2. I am further desired to state that, if your brother's conduct should in the meantime be good, His Excellency would feel disposed to grant him then a pardon, on condition of his exiling himself from the Australian Colonies and New Zealand.

3. At present His Excellency does not concur with the persons who have recommended your petition, that the sentence which the prisoner has undergone is sufficient for the ends of justice.

I have, &c.,

(Signed), HENRY HALLORAN.

(No. 10.)

Petition of Mrs. Griffiths.

To the Honourable
The Executive Council of New South Wales.

The humble petition of Archina Griffiths, wife of Henry Griffiths, 659 George Street, Sydney,—

SHEWETH:—That your Petitioner's brother, Francis Christie, was apprehended in February, 1864, and tried at the Criminal Court, Sydney, on the 8th July, before his Honour the Chief Justice, and convicted on the following charges: —For shooting and wounding Trooper Hosie he was sentenced to fifteen years imprisonment, the first two years in irons, with hard labour; and for robbing Messrs Hewitt and Horsington he received two cumulative sentences, ten and seven years, making a total of thirty-two years of hard labour.

Your Petitioner humbly implores your merciful consideration of her unfortunate brother's case, and that you will grant him a full remission of the unexpired term of his sentences, with a pardon suffering him to redeem the past in the Australian Colonies; and your Petitioner urges the following reasons:—

1. Previous to his apprehension your Petitioner's brother was obtaining his living as a storekeeper in Queensland for nearly two years, having abandoned his former career of wickedness, and had left this Colony, fully determined to lead a life of honest industry. During these two years, gold, both by escort and private hands, has, it is well known, been left in his charge with confidence and in safety.

2. That when, only four months after his conviction, there was a desperate outbreak of prisoners in the gaol, he took no part whatever therein, and his conduct

on that occasion was such as to draw from the Inspector-General of Police an assurance that he would recommend the Colonial Secretary (Mr. Forster) to make a record of it for the future benefit of the prisoner; to which record your Petitioner humbly directs your attention, the late Dr. West having told the prisoner that it had been made.

3. That the prisoner has assiduously endeavoured to make himself as useful as possible in the work appointed for him, and is the inventor of an ingenious contrivance which materially improves the making of matting, hitherto defective.

4. That the prisoner has always given every satisfaction to the Sheriff, the Governor of the Gaol, and all other officers, during the ten years of his imprisonment.

5. That although his Honour the Chief Justice has often declared his intention to visit convicted bushrangers with extreme rigour, your Petitioner would humbly plead that the cessation of bushranging in this Colony may operate in favour of the prisoner, as it appears to have done in the case of the released prisoner John Vane (whom, however, your Petitioner's brother did not know previous to his imprisonment) and others.

6. That the prisoner's health has already suffered so much from his long confinement as to cause him to be almost constantly under the hands of the doctor, for disease of the heart and other serious symptoms, which have obliged him for a time to be placed in the hospital of the Gaol, and have totally incapacitated him from continuous work.

7th, and lastly. That your Petitioner feels certain that if a pardon be granted to the prisoner, and he be permitted to once again dwell among his relatives, he will do all that lies in his power to lead an honest and respectable life, and prove himself worthy of your clemency, and will never again return to his evil ways, but by exemplary conduct in the future fully and completely redeem the past. Your Petitioner also believes that his Honour Sir Alfred Stephen will graciously recommend, as he has very often spoken very kindly to the prisoner as to his reformation, and always seemed to take a kindly interest in him.

Praying the Lord may guide to a wise, merciful and judicious conclusion in disposing of this Petition, your humble Petitioner will, as in duty bound, ever pray, &c., &c.

(Signed), ARCHINA GRIFFITHS.

We, the undersigned, beg most respectfully to recommend the foregoing Petition to the merciful consideration of the Executive Council, the more especially from the desire to reform evidenced by the prisoner before capture, and his conduct since his incarceration, and trust that you may be pleased, under all the circumstances of the case, to deem the period of the sentence already expired to be sufficient for the ends of justice.

(Signed), A. MOFFITT,
Physician and Surgeon,
135 *Castlereagh Street.*

" WILLIAM B. DALLEY.

" A. McARTHUR & Co.

" FARMER & Co.

" W. & S. GARDINER, per J. W. NIFF.

" S. HOFFNUNG & Co.

E. S. Hill, of Woolahra, having specially and carefully watched the prisoner during the past seven years of his incarceration, and having made on all occasions

strict inquiries as to his prison conduct at Darlinghurst, and uniformly received the most satisfactory reports, I I have no hesitation in recommending the prayer of the Petition.

(Signed), J. R. JONES & Co,
Produce Merchants, Sussex Street.
" H. PRIESTLY, *Ditto.*
" JOHN GRAHAM.

The Sheriff.—B. C., April 2, 1874. For U. S.—W. G.

In returning the accompanying Petition in favour of prisoner Christie, *alias* Gardiner, I beg to refer to my report, dated 12th September, 1872, upon the Petition under which the prisoner was allowed a conditional pardon.

I took occasion in that report to urge the special importance, in the public interest, involved in the dealing with the case of this prisoner, by reason of the prominence of his career and the circumstances of his case.

That importance has been fully exhibited by the necessity that the granting to Christie of a conditional pardon, at all events, initiated of reconsidering the sentences of a large number of prisoners who may be termed lesser offenders of the same description; and a plan of abridgment of such sentences was prepared with much care and forethought, the main policy of which was permitting the men concerned to leave the Australian Colonies, chiefly based upon the action taken in Christie's case, approved, and now in course of being carried out.

Upon the same principle of equitable dealing which enjoined the adoption of the plan mentioned, if the condition of exile be foregone in Christie's case, it should similarly be foregone in those of the other men, and the whole policy of the plan abandoned.

The reasons now put forward in Christie's favour were fully considered when the former Petition was dealt with, and there can be no question but that the case was determined upon with a lenity which the condition of exile alone could reconcile with public opinion, and with a sense of justice towards the general body of criminals serving their allotted periods.

I confess that I am surprised, in view of the merciful consideration with which the former Petition was treated, at the present Petition having been made, and I would most strongly deprecate any compliance with its prayer.

Principal Under-Secretary, B. C., April 20, 1874.

(Signed), HAROLD MACLEAN,
Comptroller-General of Prisons.

The enclosed Petition prays for a remission of Gardiner's sentence. The prisoner has been authorized a conditional pardon, the condition being exile, The Sheriff strongly deprecates a compliance with the prayer of the Petition. His Excellency.—H.P., 24-4-74.

Refused.—R. H., 27-4-74.

(No. 11.)

The Principal Under-Secretary to Mrs. Archina Griffiths.

Colonial Secretary's Office,
Sydney, April 29, 1874.

MADAM,—In reply to your further Petition, praying that your brother, the prisoner named in the margin, may receive an unconditional pardon, I am directed by the Colonial Secretary to inform you that His Excellency the Governor sees no grounds for authorizing a compliance with your application.

I have, &c.,
(For the Under-Secretary.)

(Signed), M. R. ALLAN.

(No. 12.)

The Principal Under-Secretary to the Sheriff:

COLONIAL SECRETARY'S OFFICE,
SYDNEY, 29th April, 1874.

SIR,—Referring to the further Petition in favour of the prisoner named in the margin, praying for the issue to him of an unconditional pardon, I am desired by the Colonial Secretary to inform you that the Governor has not seen fit to authorize a compliance therewith.

I have, &c.,
(For the Under-Secretary,)

(Signed, M. R. ALLAN.

Inclosure 2 in No. 3.

(B.)

11 VICTORIA, CAP. 34.

Punishments in lieu of Transportation.

Clause 4. AND be it enacted, that it shall be lawful for the Governor or officer administering the Government of the Colony to grant to any person under any sentence or order for transportation or of hard labour who shall have served on the roads or other public works of the Colony for not less than two years in any case a remission of the remainder of the term for which he shall have been so sentenced or ordered for transportation or hard labour, on condition that he shall not remain in or come within the Colony during the residue of his said term; and it shall be lawful for the said Governor to make such rules and regulations as he shall think fit for the mitigation or remission, conditional or otherwise, of any sentence or order for punishment under this Act as an incentive to, or reward for, good conduct whilst the offender shall be serving under such sentence or order, and to mitigate or remit the term of punishment accordingly.

(Inclosure 3 in No. 3.)

(C.)

1873-4.

LEGISLATIVE ASSEMBLY.—NEW SOUTH WALES.

Gardiner, alias *Christie*. (*Correspondence relating to Mitigation of Sentence under former Convictions.*)

Ordered by the Legislative Assembly to be printed, May 12, 1874.

(No. 1.)

Petition of Francis Clarke.

To His Excellency Sir William Denison, Knight, Governor-General of all Her Majesty's Possessions, Vice-Admiral of the same, &c., &c.

The humble petition of Francis Clarke, a prisoner of the Crown, at the Penal Establishment, Cockatoo,

Showeth,—

That your Petitioner invokes your Excellency's clemency to take into favourable consideration his youth and the temptations incident to an early career in life, when left uncontrolled by parental influence or good example, to run a giddy headstrong course of life, and become involved in the commission of a crime for which he is now under penal sentence of servitude.

Your Petitioner implores your Excellency to pause but for a moment on the five years now nearly expired of penal service he has gone through, and, in the exercise of the Royal prerogative of mercy, your Petitioner supplicates your Excellency will be graciously pleased to restore him again to society, a sadder but a wiser man than he once was.

And having the unasked recommendations of those he injured, humbly approaches your Excellency with a prayer that you will grant to him a ticket-of-leave.

And your Petitioner, as in duty bound, will ever pray, &c.

Signatures of the prosecutors,

(Signed), JNO. REID,
" EDWARD BAKER.

Reid's Flat, Lachlan River, April 6, 1859.

Meadow, Lachlan River, April 6, 1859.

I respectfully beg to append my name to the prayer of the above petition. Should his Excellency be mercifully disposed to grant this young man a ticket-of-leave, I shall be most ready to receive him into my employment, and do what in my power lies to influence his future life for good.

(Signed), WILLIAM TAYLOR.

Reid's Flat, *via* Wheeo, April 19, 1859.

I beg leave respectfully to transmit the accompanying petition, and to recommend the same to the favourable consideration of the Government.

(Signed), HENRY NEWHAM.

(No. 2.)

The Inspector-General of Police.—C.C., B.C., 27th April.

Memo.—The Visiting Magistrate of Cockatoo Island will have the goodness to report, for the information of the Government, what has been the conduct of Francis Clarke since he has been on Cockatoo Island, and, with the task-work he is likely to make, at what period he will become eligible to receive a ticket-of-leave.—Jno. McLerie, Inspector-General of Police. Convict Department, 2nd May, 1859. B.C. to the Visiting Magistrate, Cockatoo Island, 2nd May.

Mr. Taylor will compute this.—D.F., 9th May, 1859.

The task-work to the Credit of Francis Clarke, to the 30th April, 1859, is 701¾ days.

His probation will be eight years from the 17th March, 1854.

He will be eligible for a ticket-of-leave in or about December next, if he is not punished in the meantime.—Charles Ormsby, Superintendent Cockatoo Island, 12th May, 1859.

The Petitioner, Francis Clarke, a native of the Colony, was received here on the 10th April, 1854, under two sentences to the roads, the first of seven years' roads, the second of seven years' roads to commence at the expiration of the first sentence, passed upon him at the Circuit Court at Goulburn, on the 17th March, 1854, for horse-stealing; since which period his conduct has been as follows, viz.:—

30th April, 1855—Disobedience of orders; three days' cells.

17th April, 1856—Absented himself on the afternoon of this day, in company with Joseph Roberts, a native, and remained secreted until the evening of Sunday, the 20th April, 1856, when he was apprehended in the lumber-yard.

His conduct since then has been generally good.

Nothing further recorded.

(Signed), CHAS. ORMSBY,
Superintendent.

Cockatoo Island, 12th May, 1859.

D. Forbes, V.J., Penal Establishment Cockatoo Island.

Blank cover to the Principal Under-Secretary.—Convict Department, 13th May, 1859.—Jno. McLerie, Inspector-General of Police.

The man applies for a ticket-of-leave, which he will not be entitled to until December next.—C.C., 25th May.

(No. 3.)

The Under-Secretary to Government to the Visiting Justice, Cockatoo Island.

Colonial Secretary's Office,
Sydney, May 30, 1859.

Sir,—Referring to the petition from the prisoner named in the margin, praying for a mitigation of his sentence of fourteen years' labour on the roads or public works, I am directed to request that you will apprise the prisoner that by good conduct he will be eligible for a ticket-of-leave about December next.

I have, &c.

(Signed), W. ELYARD.

(No. 4.)

Mr. H. Newham to the Colonial Secretary.

Reid's Flat, Lachlan River,
Wheeo, July 5, 1859.

Sir,—Referring to a petition in behalf of Francis Gardiner, *alias* Clarke, a prisoner of the Crown, under sentence at Cockatoo, which I became the medium of transmitting to the Government six weeks since, it being recommended by the prosecutors in the two cases of conviction, and undertaking to afford the man employment in my own service as also others, a guarantee that the locality are quite willing he should return to his native home.

I respectfully solicit information whether it has pleased the Executive Government to exercise the Royal clemency, by granting a remission or commutation of sentence under which Gardiner now labours. And those who have interested themselves in the subject will feel thankful for the communication.

I have, &c.,

(Signed), HENRY NEWHAM.

He may perhaps be informed of the answer given to the petition.—C. C., 12th.

(No. 5.)

The Under-Secretary to Government to Mr. Henry Newham.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, July 14, 1859.

SIR,—In reply to the enquiry contained in your letter of the 5th instant, I am directed to inform you that the Visiting Justice of Cockatoo Island has been instructed to apprise the prisoner named in the margin that by good conduct he will be eligible for a ticket-of-leave about December next.

I am, &c.,

(Signed), W. ELYARD.

(No. 6.)

Petition of Henry Newham..

To his Excellency Sir Thomas Denison, Knight, Captain-General and Governor-in-Chief of all Her Majesty's Australian Possessions, Vice-Admiral, &c., &c., &c.

MAY IT PLEASE YOUR EXCELLENCY,—I had the honor a few weeks since to be placed in receipt of a communication from the Honorable the Colonial Secretary, intimating to me that in the month of December next a ticket-of-leave would be granted to the prisoner named in the margin.

The application made in his favor had the spontaneous recommendation of his prosecutors. Their sympathy is enlisted with mine, because it has transpired since his conviction that, young and inexperienced at the time, he was made the dupe of others.

I guarantee him permanent employment on one or other of my properties.

And, therefore, I most respectfully solicit the indulgence, at your Excellency's hands, of a ticket-of leave in the young man's favor, for the district of the Lachlan River; and I will second the humane considerations of the Government to restore him to society a good and a useful member.

I have, &c.,

(Signed), HENRY NEWHAM.

Reid's Flat, Lachlan River, November 10, 1859.

Inspector-General of Police.—W. E., 14th November, 1859, B. C.

Francis Gardiner, *alias* Clarke, has been recommended for a ticket-of-leave this month, and the classification Board have offered no objection to his receiving the indulgence for Carcoar, the nearest police district to the Lachlan River.—Convict Department, 13th December, 1859.—Jno. McLerie, Inspector-General of Police.

To the Private Secretary.—December 13, B. C.

Has this been authorized ?—22nd. Yes. See list enclosed in 59–6308 herewith. —28th.

Inform.—28th.

(No. 7.)

To the Honorable the Board of Classification for determining on eligibility of Prisoners of the Crown to Remission of Sentence, &c., &c., &c.

GENTLEMEN,—I have previously placed myself in communication with the Government in respect of soliciting that the Crown prisoner, intimated in the margin, may be granted a ticket-of-leave for the Lachlan River District.

I have interested myself in this young man's behalf on principle. Since his conviction it is known to me that he was the dupe of artful and designing knaves, who, profiting by his inexperience and knowledge of the world, left him to wither his best years in abject servitude.

The two prosecutors in this case have given me their signatures, and they respectfully invoke the clemency of the Government. They recommend a ticket-of-leave to be granted for the district; they are not apprehensive of wrong being meditated by him.

I have already pledged myself to find permanent employment for this man on one or other of my stations.

And, Gentlemen, in conclusion, I will say, in assisting individually to carry out the beneficent intentions of the Government, by granting a ticket of leave, to reclaim and restore to society an erring member, I shall do a meritorious service, and respectfully trust that you, Gentlemen, will second me in my endeavours.

I shall presume on the favor of your acknowledgment of receipt of this communication.

I have, &c.,

(Signed), HENRY NEWHAM.

Inspector-General of Police.—B. C., 6th December, 1859, W. E. To be returned.

(No. 8.)

The Chairman of the Convict Classification Board to the Under-Secretary to Government.

CONVICT DEPARTMENT,
SYDNEY, December 10, 1859.

SIR,—I have the honor to transmit herewith, for the information of the Honorable the Chief Secretary, a list (in duplicate) of Colonial convicts on Cockatoo Islands, claiming indulgence this month.

I have, &c.,

(Signed), JNO. McLERIE.
Chairman of the Convict Classification Board.

EXTRACT from a Return of Colonial Prisoners brought before the Classification Board by the Visiting Magistrate of Cockatoo Island, for indulgences, during December, 1859.

Name.	Ship.	Where tried.	When tried.	Offence.	Sentence.	When eligible according to Regulations.	Punishment received while under sentence.	When eligible with punishment.	Taskwork for which credit is claimed.	District for which Ticket of leave is desired.	Nature and date of recommendation by the Board.
Francis Clarke.	Native.	Circuit Court, Goulburn.	March 17, 1854.	Horse Stealing.	7 years roads, and 7 years roads to commence at expiration of the first sentence.	March 17, 1862.	3 days.	March 23, 1862.	796¾	Carcoar	Ticket of leave December 26.

(Signed), GOTHER K. MANN,
Cockatoo Island, December 1, 1859.

To the Chairman of the
Classification Board, &c., &c.

(Signed), S. NORTH, for the Visiting Magistrate.

Recommended.
For the Board,

(Signed), JNO. McLERIE, *Chairman.*

Governor-General.—W. F., Dec. 21. W. DENISON.

Chairman.—B. C., Dec. 22, 1859.

(No. 9.)

The Under-Secretary to Government to Mr. Henry Newham.

Colonial Secretary's Office, Sydney, December 30, 1859.

SIR,—Referring to your memorial of the 10th ultimo, I am now directed to inform you that the prisoner named in the margin has been allowed a ticket-of-leave for the Police District of Carcoar.

I have, &c.,

(Signed), W. ELYARD.

(No. 10.)

Mr. Edward Ledsam to the Under-Secretary to Government.

REID'S FLAT, WHEO, December 13, 1859.

SIR,—I beg leave respectfully to place myself in communication with you, having reference to the Crown prisoner herein named, who has, I am informed,

become eligible, from some years probation of penal servitude at "Cockatoo Prison Establishment," for a "ticket-of-leave."

It is within my knowledge that the parties who prosecuted this man have transmitted or appended their certificates in his behalf, the gist of their recommendation being that Gardiner might be granted his indulgence of a "ticket" for the Lachlan district.

Persons of undoubted character and respectability are willing to engage him; they have subscribed to the petition in these terms.

And in addition to their zeal in this youg man's behalf, I beg leave to become an advocate in the same cause. Trusting that the Executive Government will enable the friends of this unfortunate young man to establish him in credit to earn for himself a good name.

I have, &c.,

(Signed), EDWARD LEDSAM.

Answered, I believe, on another paper?—10th. Herewith.—11th. Inform that a ticket-of-leave has been authorized in terms of the report of the Inspector-General of Police.—12th,

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(No. 11.)

The Under-Secretary to Government to Mr. Edward Ledsam.

COLONIAL SECRETARY'S OFFICE,
SYDNEY, January 13, 1860.

SIR,—In reply to your letter of the 13th ultimo, I am directed by the Colonial Secretary to inform you that the prisoner named in the margin has been allowed a ticket-of-leave for the Police District of Carcoar.

I have, &c.,

(Signed), W ELYARD.

(No. 12.)

Petition of Frederick Gardiner.

To His Excellency Sir William Thomas Denison, Knight Commander of the Honourable Order of the Bath, Governor-General in and over all Her Majesty's Colonies of New South Wales, Tasmania, Victoria, South Australia, Western Australia, and Captain-General and Governor-in-Chief of the Territory of New South Wales and its Dependencies, and Vice-Admiral of the same, &c., &c., &c.

The humble petition of Frederick Gardiner, of the Fish River, in the Colony of New South Wales, farmer and grazier,

Sheweth:—

That on or about the seventeenth day of March, one thousand eight hundred and fifty-four, one Francis Clarke was tried at the Circuit Court, Goulburn, and convicted of horse-stealing on two several indictments.

That the said Francis Clarke was sentenced in each case to seven years' imprisonment.

That he served nearly six years at Cockatoo Island, and then obtained a ticket-of-leave for the district of Carcoar.

That he has been residing in the district of Carcoar for some months past, and his character and behaviour has been such as authorizes your petitioner in seeking on his behalf some mitigation of punishment.

Your Petitioner, therefore, humbly prays that your Excellency will be pleased to mercifully consider the premises, and afford such relief to the said Francis Clarke as to your Excellency shall seem meet.

And your Petitioner, as in duty bound, will ever pray, &c.

(Signed), FREDERICK GARDINER.

Weogo, December, 1860.

We, the undersigned householders, residing in the Districts of Bathurst and Carcoar, hereby certify to your Excellency that we have read the annexed Petition, and declare that we knew the said Francis Clarke a considerable time before his conviction, and have known him since, and we beg conscientiously and strongly to recommend the prayer of the Petition.

(Signed), ISAAC SHEPHERD, J P., *Wheeo.*
" JOHN REED, *Grazier,* } *Prosecutors.*
" EDWARD BARKER, *Grazier,* }
" FRANCIS HARRIS, *Grazier.*
" WILLIAM FOGG, *Grazier.*
" WILLIAM ATKINS, *Grazier.*
" CHARLES AUGUSTUS HOWARD, *Grazier.*
" RICHARD TAYLOR, *Grazier.*
" HENRY NEWHAM, *Grazier.*

By direction of the Administrator of the Government, referred to the Honourable the Colonial Secretary for a report from the Judge who tried the case.—B. C., 11 February, 1861—W. E. Oliver, Private Secretary.

C. C., February 13, 1861.

(No. 13.)

The Under-Secretary to Government to His Honour the Acting Chief Justice.

Colonial Secretary's Office,
Sydney, February 15, 1861.

Sir,—I am directed to request the favour of your Honour's report upon the accompanying Petition, for mitigation of the sentence of seven years' hard labour on the roads, passed upon the prisoner named in the margin, by his Honour Sir Alfred Stephen.

I have, &c.,

(Signed), W. ELYARD.

(No. 14.)

The Chief Justice to the Colonial Secretary.

Supreme Court, April 2, 1861.

Sir,—I have perused all the papers sent me respecting Francis Clarke, otherwise Gardiner; although many of them appear to me to be unnecessary to my report.

I know nothing of any of the parties signing the various recommendations; and I observe that the names of Messrs. Ledsam and Newham, on whom I feel disposed from the style and tenor of their letters to place much reliance, do not appear to the recent application.

If there be no reason to doubt the representation, however, that Clarke has conducted himself well since the acquisition of his ticket-of-leave, then I should not hesitate to advise compliance with the Petition, bearing in mind the assurances given, prior to that indulgence, that the prisoner had been led to the crime for which I sentenced him by other persons practising on an inexperienced young man; and that there was every reason to hope that restoration to society would benefit him without inflicting injury on others.

The only matters apparent on my notes of the trial are, that the prisoner committed some wholesale larcenies of horses, and found an easy sale, by travelling with a pretended servant—really his accomplice.

I am, &c.,

(Signed), ALFRED STEPHEN.

Refer to the District authorities to ascertain what character the man now bears there.—C.C., 5th April, 1861.

The Inspector-General of Police, for inquiry and report.—B.C., 8th April, 1861, W.E. To be returned.

The Police Magistrate of Carcoar (the district in which Clarke has been holding a ticket-of-leave) has reported most unfavourably of the man's conduct, so much so that I have recommended the cancellation of the indulgence he holds.

(Signed), JNO. McLERIE,
Inspector-General of Police.

Police Department,
Convict Branch, May 14, 1861.

B. C.—To the P. U. Secretary.—14th.

The Chief Justice recommended a remission of sentence in the case of Francis Clarke or Gardiner, provided it was found that he had conducted himself well. It appears by the report of the Inspector of Police that this is not the case, and that the account received of him from the district is very unfavourable.

C. C.
May 23, 1861.

Prayer of Petition cannot be acceded to.—J. Y., May 24, 1861.

(No. 15.)

The Under-Secretary to Government to the Inspector-General of Police.

Colonial Secretary's Office,
Sydney, May 27, 1861.

Sir,—Referring to the petition from the prisoner named in the margin, praying for a mitigation of his sentence of fourteen years' labour on the roads, &c., I am desired by the Colonial Secretary to inform you that the Governor has not seen fit to authorize the remission of any portion of the prisoner's sentence, and to request that that individual may be apprised accordingly.

I have, &c.,

(Signed), W. ELYARD.

(No. 16.)

Memorandum.

POLICE DEPARTMENT, INSPECTOR-GENERAL'S OFFICE,
SYDNEY, October 12, 1863.

Francis Clarke or Gardiner, the bushranger, was convicted at Goulburn Circuit Court, on 17th March, 1864, and sentenced to two sentences of seven years each to the roads, on two charges of horse-stealing.

A native of Boro Creek, near Goulburn.

Obtained a ticket-of-leave on 31st December, 1859, for Carcoar, which was cancelled on 15th May, 1861; absence from district, and suspected of cattle stealing.

Inclosure 4 in No. 3.

(D.)

1873-4.

LEGISLATIVE ASSEMBLY—NEW SOUTH WALES.

Administration of Justice. (*Liberation and Exile of Prisoners.*)

Ordered by the Legislative Assembly to be printed, May 22, 1874.

RETURN to an Address of the Honourable the Legislative Assembly of New South Wales, dated 8th May, 1874, praying that His Excellency the Governor would be pleased to cause to be laid upon table of this House:—

"A return of the prisoners whom it is proposed to exile or liberate during the next twelve months, showing in each case the name of the prisoner, his offence, the duration of imprisonment to which he was sentenced, the period of sentence already elapsed, whether he had been previously convicted, and, if so, for what offence, and the duration of his sentence; also, the Minutes of His Excellency's Advisers, giving the reasons, if any for such exile or liberation."—(*Mr. Combes.*)

(No. 1.)

Minute of the Colonial Secretary.

I have spoken to the Chief Justice on the subject of the sentences of the men convicted of the crime of bushranging at and about the time of Christie's conviction. I concur in a suggestion made by Sir Alfred Stephen, that the Sheriff prepare a statement of each case, showing age, previous character, number of offences, sentence, conduct in gaol, and other particulars, with a view to the consideration of all the cases.

H. P., 20–9–72.

The Sheriff, B. C., September 21–72.—For U.S. W.G. To be returned.

(No. 2.)

The Sheriff to the Principal Under-Secretary.

PRISONS DEPARTMENT, SYDNEY, 21st January, 1873.

SIR,—In compliance with the desire of the Honourable the Colonial Secretary, I have given my careful attention to the cases of prisoners serving long sentences under convictions of robbery with arms, or as is termed bushranging, and which sentences were imposed at a period when it was thought necessary to deter from the commission of crime of that particular character, by severe examples of punishment.

2. In my report of the 12th September last, on the case of Christie *alias* Gardiner, I took occasion to refer to this subject, and to the expectations generated in the minds of the prisoners of the class mentioned, by reason of remarks made by the

Judges at the times of sentencing, and from the action of the Executive in commuting from time to time a number of sentences; and I pointed out that the dealing with Gardiner's case, from the prominence of his career, would be by these men regarded as indicative of what they would, as to possible commutation of sentences, have to look forward to. I may here mention that, during the period which it is proposed to embrace in this report, there have been forty-seven cases of the kind in question in which remissions of more or less time has been made of periods ranging from nine to three years; some by conditional pardons, and these generally for the longer periods, excepting as regards a few cases wherein it has been made on the merits of the conviction, under circumstances subsequently brought to light. In the larger number of cases, the length of the sentences and the diminution of bushranging were, I understand, mainly operative; at any rate, it is so regarded by the prisoners still detained.

3. I conclude that it was intended that the decision in Gardiner's case should in a great measure govern the dealing with those of the other men now under consideration.

4. The cumulative sentences of Gardiner amount in all to thirty-two years. The decision conveyed in your letter of the 10th December last is equivalent to allowing him a pardon on condition of his exiling himself beyond the Australian Colonies and New Zealand, after a penal service of ten years, which may be taken substantially as a remission of two-thirds of his sentence upon that condition. I do not suppose that his liberation within the Colony, were he unable to comply with the exiling condition, would be assented to under a service of fifteen years, or one-half the entire period.

5. It is highly desirable, in carrying out a general reduction of the sentences now under consideration, to give a large preference in point of time to exiling rather than liberation in the Colony. Yet, to allow no abatement whatever to those who may be unable to provide means of exiling would be to give an undue advantage to means of friends or accidental circumstances—as, for instance, a prisoner having been a sailor, and able to work his passage; while it would be a denial, in the majority of cases, of the expectations the men have been permitted, as above stated, to form.

6. I regard sentences of ten years and upwards as within the category contemplated by the Government. Were that period not to be taken as a minimum, many cases comprehended in the intention would be excluded—in fact, the large majority—and great discontent would be occasioned.

7. These cases are embraced within the period from 1860 to 1870 inclusive, which may be said to comprehend that from the commencement to the suppression of bushranging as a peculiar and distinctive crime of the Colony.

8. It was my intention to have submitted the cases in a schedule form, something like that used for the ordinary monthly remissions, but I think that a general direction in a more comprehensive form could more conveniently be given upon this report, and a schedule afterwards submitted under the guidance of such directions.

9. In making commutations, it will be necessary to do so on a scale lessening the periods of reduction according to the lesser duration of the sentences,—the principle in operation under the remission regulations.

10. By the adoption of such a scale, whilst so large a concession will not be made in all cases as in that of Gardiner (whose conduct in gaol was taken into material account), the other long-sentenced prisoners for the like crime will gain considerable benefit beyond the provisions of the existing regulations.

11. Taking the case of Gardiner as a starting-point, I have the honour to submit the following suggestions, subject to reservations to be noticed further on, viz.:—

(1.) That sentences to life be treated as for thirty years, and that such sentences and all others above fifteen years be treated, with some modifications according to the precedent of Gardiner, thus:—Conditional pardons to be allowed after a service of $\frac{5}{12}$ths, which, in a sentence of thirty years, would amount to twelve years and six months. And liberation in the Colony after a service of $\frac{7}{12}$ths, which in a sentence of thirty years would give a service of seventeen years and six months.

*(2.) In sentences of fifteen years and others above ten, conditional pardons on a service of $\frac{5}{12}$ths, amounting in a fifteen years' sentence to a service of six years and three months; and liberation in the Colony on a service of $\frac{7}{12}$ths, amounting in a sentence of fifteen years to a service of eight years and nine months.

(3.) In sentences of ten years, conditional pardon on a service of $\frac{6}{12}$ths or $\frac{1}{2}$; liberation in the Colony on a service of $\frac{3}{4}$ths, as allowed now by regulation for longer sentences, making a service of seven years and six months.

The reservations that I desire to mention in the application of the suggestions above offered are in respect of the cases wherein life has been sacrificed in the commission of the crime; of second or more convictions for the like crime; the prisoner's conduct in gaol; more than ordinary reason to anticipate that he might (if liberated in the Colony) return to the same courses, and any special circumstances in his disfavour.

The first description I propose to submit separately, each on its own merits. In the second it is a question whether any unconditional commutation should be allowed. Misconduct in gaol I propose to count as forfeiture of time of commutation against the prisoner (unless there be some special reason to the contrary) according to the system under the regulations, and the other considerations to bring forward in the schedule, which, upon being favoured with the views of the Government upon the general subject, I shall be prepared to submit.

I have, &c.,

(Signed), HAROLD MACLEAN,
Sheriff and Inspector of Prisons.

(No. 3.)

The Sheriff to the Principal Under-Secretary.

In reference to his Excellency's notation in pencil opposite to division (2) of paragraph 11, I may explain that the form of distinction betwen divisions (1) and (2) remained in the Report by error, and the similar treatment proposed for prisoners under sentences above fifteen years and for life, and of those of fifteen years and above ten, is, as observed, inconsistent with the principle laid down in paragraph 9 of lessening the periods of reduction according to the lesser duration of the sentences.

My recommendations were originally framed making the service required from division (2) $\frac{7}{12}$ths and $\frac{8}{12}$ths; but this proposition I was obliged to abandon, because, following on the plan by a still further reduced commutation to the ten years men, there would be nothing material left to them beyond the existing regulations.

The ten years and from ten to fifteen years' men form the main—almost the whole—body under consideration. The principle on which my recommendations are based is carried out in their case; but, for the reasons above given, cannot be applied to sentences above fifteen years, without making a larger diminution in such cases than seems to be desirable, it being borne in mind that such sentences indicate either magnitude or frequency of crime.

The distinction between divisions (1) and (2) should, excepting as regards life sentences counting for thirty years have been omitted in my Report.

H. M'L. 5th June, 1873.

His Excellency.—H. P., 4–7--73.

I think, with this amendment, the cases of the prisoners referred to might be dealt with in the general manner recommended by the Sheriff, each case being submitted with a separate Report from the Sheriff as to whether there are any circumstances in connection with it which render it undesirable to apply to it the general regulations in theaccompyaning letter of the 21st January.—

H.R., 5--7--73.

H. P., 10--7--73.

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* *Pencilled Note by his Excellency the Governor*:—This is apparently the same as (1,) and therefore inconsistent with the recommendation in par. 9.

I.—RETURN of Prisoners to be Exiled or Liberated during next Twelve Months (say) to April 30th, 1875.

Name.	Offence.	Date of Sentence.	Sentence.	Period Served.	Previous Convictions.	Recommendation of the Sheriff.	Decision of His Excellency.
William Brookman...	Wounding with intent to murder.	16 Jan., 1868..	Death; commuted to 15 years roads.	6⅓ years..	None known	May be allowed conditional pardon after 13th April, 1874. Question of liberation in Colony to be postponed.	Approved—H.R. 1/10/73.
Samuel Clarke.....	Robbery, being armed and horse-stealing.	18 April, 1866..	15 years roads.....	8 1/12 do ..	do	May be allowed a conditional pardon; failing means, to be brought forward for consideration for liberation In January, 1875.	do
Dennis Shea.....	Robbery, being armed	6 Nov., 1860..	15 years roads, first 2 irons.	8½ do ..	Stealing, 2 years.....	May be allowed a conditional pardon.	do
William Willis, *alias* Dunkley.	do 3 charges....	16 May, 1866..	7 years roads.....	8 do ..	Stealing (3 charges), 9 mo's., 18 mo's., 6 months.	do ...	do
Alexander Fordyce...	Robbery & wounding	23 Feb., 1863..	Death; commuted to life, first 3 years in irons.	11¼ do ..	None	May be allowed a conditional pardon now; failing taking advantage, case to be brought forward commencement of June, 1874.	do
John Payne.....	Robbery, under arms, 2 charges.	14 Jan., 1868..	20 years, two of ten years each; the second sentence remitted by His Excellency.	6⅓ do ..	do	May be allowed a conditional pardon after service of 7 years.	do
James Jones.....	Robbery, under arms	31 Mar., 1864..	15 years; first 3 irons....	10 1/12 do ..	do	May be allowed a conditional pardon after service of 10 years.	do
Robt. Cotterell, *alias* Blue Cap.	Robbery, being armed	20 April, 1868..	10 years roads.....	6 1/12 do ..	None	Not a case for liberation; may be allowed a conditional pardon.	do
James Boyd, *alias* M'Grath.	do ...	24 Feb., 1864..	10 do	9¼ do ..	Horse-stealing, 5 yrs roads.	May be allowed a conditional pardon.	do

Thos. Cunningham, *alias* Smith.	do	...	9 April, 1867..	15	do	.....	$7\frac{1}{12}$	do ..	None known.	May be allowed a conditional pardon; failing to avail, case to be brought forward for liberation in January, 1876.	do
Chas. Hugh Gough, *alias* Windham, *alias* Bennett.	do	...	9 April, 1867..	15	do	.....	$7\frac{1}{12}$	do ..	Assault, with intent to rob, 3 years.	To be allowed	do
Thomas Dargue.....	do	...	28 Mar., 1867..	10 years roads, first year in irons.			$7\frac{1}{6}$	do .	None known.....	May be allowed a conditional pardon; case for liberation to be brought forward in September, 1874.	do
Henry Dargue	do	...	28 Mar., 1857..	10 years roads.....			$7\frac{1}{6}$	do ..	do	do ...	do
John Kelly.....	do	...	11 Mar., 1867..	14 years, first 2 in irons..			$7\frac{1}{6}$	do ..	Embezzlement, 2 yrs.	May be allowed a conditional pardon; case may be brought forward for liberation in May, 1875.	do
James Smith.....	do	...	15 April, 1867..	17 years roads.....			$7\frac{1}{12}$	do ..	Horse-stealing, (2 charges), 3 years roads.	Case to be brought forward for consideration as to conditional pardon in May, 1874.	do
John Foran.....	Robbery, being armed 3 charges.		18 Oct., 1867..	15	do	.....	$6\frac{7}{12}$	do ..	None known.....	May be brought forward for conditional pardon in January, 1874.	do
Edward Kelly.....	Robbery, with arms..		14 Jan., 1868..	15	do	.....	$6\frac{1}{3}$	do ..	do	Case for conditional pardon; may be brought forward in April, 1874.	do
John Williams.....	Wounding, with intent to murder.		14 Jan., 1868..	Death; commuted to 15 years roads.			$6\frac{1}{3}$	do ..	do	May be brought forward for consideration as to conditional pardon in April, 1874.	do
Wm. H. Simmons.....	Robbery, being armed		6 April, 1868..	15 years roads.....			$6\frac{1}{12}$	do ..	Larceny (2 charges), 10 years roads.	May be brought forward for conditional pardon in April, 1874.	do
Wm. Taverner.....	do	...	5 April, 1867..	10 years roads, commuted to 8 years.			$5\frac{1}{12}$	do ..	None known.....	May be allowed conditional pardon; case for liberation to be brought forward in April, 1875.	do
Daniel Taylor.....	Robbery, being armed and horse-stealing.		24 Oct., 1865..	15 years roads.....			$8\frac{1}{12}$	do ..	do	May be allowed a conditional pardon; case for liberation to be brought forward in January, '75	do
John Bollard.....	Assault, with intent to rob, being armed		19 Oct., 1869..	10	do	.....	$4\frac{7}{12}$	do ..	do	May be brought forward for conditional pardon in October, 1874.	do

I.—RETURN of Prisoners to be Exiled or Liberated during next Twelve Months, &c.—*Concluded.*

Name.	Offence.	Date of Sentence.	Sentence.	Period Served.	Previous Convictions.	Recommendation of the Sheriff.	Decision of His Excellency.
Francis Christie, *alias* Clarke, *alias* Gardiner.	Wounding, with intent to do grievous bodily harm and highway robbery.	8 July, 1864..	32 years roads, first 2 in irons.	10 do ..	Horse-stealing, 14 years.	(Full Reports, Minutes, &c., in this case already laid before Parliament)	
John Bow	Robbery, with wounding.	26 Feb., 1863..	Death; commuted to life on roads; first 3 years in irons.	11¼ do ..	None..... ..	May be allowed a conditional pardon now (in August, 1873); failing to take advantage thereof, case for liberation in the Colony to be brought forward in June, 1874.	I approve the Sheriff's recommendation in this case—H.R. 19/8/73.

May 14, 1874.

(Signed), HAROLD MACLEAN,
Comptroller-General of Prisons.

(Inclosure 5 in No. 3.)

(R.)

1873-4.—New South Wales.

Minute of His Excellency Sir Hercules Robinson, and proceedings of the Executive Council with respect to the release of the Prisoner Gardiner.

Presented to both Houses of Parliament, by Command.

Minute by the Governor for the Executive Council.

I have to lay before the Executive Council six petitions and memorials which have been addressed to me with regard to the proposed mitigation of Gardiner's sentence. These representations, viewed in connection with the public discussions which have recently taken place on the same subject, have led me very carefully to consider whether any fresh facts have been brought to light which would justify me in disappointing now the expectations which I raised when this prisoner's case was first submitted to me—about eighteen months ago.

It is true that no positive compact was then made with the prisoner, or any decision given in the nature of an absolute remission, which would of course have been irrevocable; but it is beyond question that a hope was held out to him by my Minute of the 5th December, 1872, that if he continued to conduct himself well he would in all probability be allowed a pardon, conditional on his leaving the country so soon as he had served ten years of his sentence.

I think that this may fairly be held to have been tantamount to a promise, contingent alone on the prisoner's good conduct in gaol; and that it was so viewed by myself at the time, and by the Honorable the Colonial Secretary subsequently, is apparent from my Minute of the 7th December, 1872, in which I stated "I have already decided to grant a conditional pardon at the termination of ten years' imprisonment," and from the Colonial Secretary's Minute of 24h April last, in which, when submitting to me a petition for Gardiner's unconditional release, he observes, "the prisoner has been authorized a conditional pardon, the condition being exile." The Sheriff too obviously viewed the matter in precisely the same light, and referred, in his letter of the 21st January, 1873, and in his Minute of the 20th April, 1874, to Gardiner's case as one that had been practically decided and disposed of.

I may mention that it has been the practice here for many years for the Governor, when dealing with applications for mitigation which have appeared premature, to fix a date at which the case might again be brought under his consideration. Hopes so held out have always been regarded by the prison authorities, and by the prisoners themselves, as equivalent to promises of pardon, conditional on good conduct, and in every such case the expectation so raised has been, I believe scrupulously fulfilled. I remember one case in which Sir Alfred Stephen, as Administrator of the Government, intimated to one of the most prominent and daring of the bushrangers that his case might again be brought forward for consideration as soon as he had served seven out of the nineteen years to which he had been sentenced, The papers came before me at the time specified, and, as the case appeared to me a bad one, I declined to sanction any greater remission than that contemplated under the general regulations for bushranging cases, unless Sir Alfred Stephen's intimation was held to be a promise. I was informed by the Sheriff that this was unquestionably the view in which the decision had been looked on in the gaol, and I accordingly authorized the prisoner's discharge on conditional pardon, four years before the date at which he would have been eligible for exile under the special mitigation regulations laid down for such cases.

Of course I am aware that, under certain circumstances, it might be wise and proper to withhold the fulfilment of such promises, whether positive or implied. For example, a promise given under false representations would not be binding, and a

promise to release a prisoner which it was subsequently found would, if carried out, imperil the public safety, should be cancelled. The practical question for consideration in the present case is, therefore, simply this: Are there any such grounds which would justify me in now withholding the conditional pardon which nearly two years ago I led Gardiner and his friends to expect that he might receive about this time?

I have seen it urged that Gardiner's case was decided upon false representations, it being alleged that some of the signatures attached to the petition were forgeries, and that there was a previous conviction against Gardiner in Victoria, which had been concealed. But I think these grounds, even if they were facts, which they have not been proved to be, would be quite insufficient to release me from my implied promise. In a petition so numerously and influentially signed a few signatures more or less of persons of whom I had no knowledge would have been immaterial, and I cannot say that my decision would have been different if it had been stated on the papers that, before Gardiner commenced his criminal career in New South Wales, he had been convicted in Victoria of horse-stealing in 1830—nearly a quarter of a century ago. In view of the grave character of his crimes in New South Wales such a comparatively minor offence would have appeared insignificant. I must, therefore, as I have said, dismiss these pleas as insufficient.

The question remains—would the public safety be in any way jeopardised if the expectation held out to Gardiner, of being allowed to exile after ten years, were now fulfilled? I think not. Sir Alfred Stephen observes, in his letter on Gardiner's case, "the end and object of all punishment are, first, the preventing of the individual, and secondly, the deterring of other individuals, from the committing of similar crimes." Have these ends been attained in the present case? I think they have. The sentence of thirty-two years passed upon Gardiner, was imposed at a time of great excitement, and his punishment would seem to have been measured more in view of the crimes with which he was supposed to have been connected, than with reference solely to those of which he was actually convicted. It was probably never intended that such a sentence should be served in full; and, looking dispassionately at all the circumstances of the case, I consider that ten years of rigorous penal discipline within the walls of a gaol—the first two years in irons—followed by expatriation for a further period of twenty-two years, is a punishment amply sufficient to satisfy the ends of of justice, and to deter others from following Gardiner's bad example.

Whether Gardiner's apparent reformation is sincere is a point which time alone can determine. I am myself disposed to think that, after the experience he has gained, and under the altered circumstances of the Colony, he might be released even in Sydney without any substantial danger; but there are many persons who apparently think differently, and who believe that if Gardiner had an opportunity he would revert to bushranging; and these fears, which are entitled to consideration, have been aggravated by a few isolated robberies which have occurred just at the time when this case was attracting public attention. Assuming, however, that these apprehensions are reasonable and well founded, it appears to me that they are fully met by the condition of exile, which the Government will of course, take effectual means to enforce. A legislative enactment authorizes and empowers the Government to take the necessary steps for this purpose, and none of the old and settled counties will offer opportunities for the peculiar crime of bushranging, even if Gardiner were disposed to revert to it. I do not think that sufficient weight has been allowed throughout the community to this condition of exile which it is intended to attach to Gardiner's pardon, and which supplies, in my opinion, effectual security for "preventing the individual from the committing of similar crimes."

The end and object of all punishment would, therefore, seem to have been secured by the course which it is proposed to adopt in the present case. The prisoner has, I hold, been sufficiently punished, and he can, I conceive, with safety be set free, upon condition of his leaving the country. If, while entertaining as I do these opinions, I were to break faith with the prisoner, and retain him in goal beyond the time specified for his liberation, I should be doing so, not because I think such a course necessary, but simply in response to clamour which I believe to be unreason-

able and unjust. It is indispensable for the maintenance of prison discipline that every hope held out to prisoners should be scrupulously fulfilled; that every promise made or implied, should be held sacred, or broken only on grounds, the sufficiency of which would be apparent even to the prisoners' minds. I can see no such grounds in the present case; and I am convinced that the moral bad effect upon the whole body of prisoners throughout the Colony, as well as upon the community generally, which would result from disappointing without sufficient reason an expectation raised by Her Majesty's Representative, would be infinitely greater than any practical inconvenience which would be likely to result from keeping faith with the prisoner, and allowing him to leave the country.

For these reasons I think that Gardiner should receive a conditional pardon at the time when he was led to expect one, and that the Government should, at the same time, take steps to secure, as far as practicable, the continued absence of the prisoner from the Australasian Colonies during the unexpired term of his sentence. I am sorry to think that such an exercise of the Royal prerogative of pardon is unfavourably regarded at the present moment by certain sections of the public, but it appears to me that the course which I suggest is the only course now open to the Government consistent with honor and justice, and I confidently anticipate that the fairness of this view will eventually be acknowledged by all impartial and reflecting members of the community.

(Signed), HERCULES ROBINSON.

GOVERNMENT HOUSE,
June 23rd, 1874

Minute of the Executive Council.

(Minute, 74-30.)

At Government House, Sydney, June 24, 1874.

Present:

His Excellency the Governor,
The Honourable the Colonial Secretary,
The Honourable the Colonial Treasurer,
The Honourable the Secretary for Lands and Mines,
The Honourable the Secretary for Works, and
The Honourable the Minister of Justice and Public Instruction.

His Excellency the Governor lays before the Council six petitions and memorials which have been presented to him, with regard to the proposed release of the prisoner Gardiner; also a Minute by His Excellency, setting forth his views on the subject.

2. The Council, having duly considered the petitions and Minute referred to are of opinion that sufficient grounds do not exist to warrant them in advising His Excellency to depart from the promise implied in His Excellency's Minute of the 5th December, 1872, upon the case of the prisoner Gardiner.

(Signed), ALEX. C. BUDGE,
Clerk of the Council

Inclosure 6 in No. 3.

(S.)

PRISON REGULATIONS.

Sentences of Prisoners.

(No. 1.)

The Sheriff to the Principal Under-Secretary.

SHERIFF'S OFFICE, PRISON BRANCH,
SYDNEY, March 25, 1867.

SIR,—As the position and treatment of prisoners in the gaols will, under the new regulations, be materially influenced by the nature of the sentences passed by the Courts, I do myself the honour to suggest that the special attention of the Judges, both of the Supreme and Quarter Sessions Courts, be specially invited to the Regulations.

I have, &c.,

(Signed), HAROLD MACLEAN,
Acting Inspector of Prisons.

(No. 2.)

Minute of the Colonial Secretary.

I am not sure that I understand the reason on which this recommendation is founded. If the sentences of the Courts are determined by considerations as to the operation of gaol regulations, what actual effect can any regulations have on the sentences?

The Sheriff.—B.C., March 27, 1867.—H.H. H. P.—26-3-67.

(No. 3.)

Memorandum of the Sheriff.

My recommendation had reference almost entirely to the classification regulations, from 26 to 32 inclusive.

I think it right that the Judges by whom, in their discretion, and according to the circumstances, the extent of punishment is in most instances allotted, should know in what the several punishments which it may, in any case, be in their power to award, consist; as, for instance, those in the 2nd and 3rd classes, to either of which prisoners for the same offence in law, with possibly a wide difference in guilt, may by the nature of their sentences, be consigned. In case of complaint at trial it seems well, also, that the Court should be aware of the rights allowed to prisoners for arranging their defence.

The Judges are in the habit of increasing their sentences in cases of repeated convictions, irrespectively of the circumstances of the crime. It seems to me to be right that they should be aware of the disabilities under which such prisoners are placed by the remission regulations.

Principal Under-Secretary.—B.C., March 28, 1867.—H.M.

(No. 4.)

Minute of the Colonial Secretary.

The whole subject of criminal treatment is one of so much difficulty, and is yet in so immature a state, notwithstanding the attention and study which have been bestowed upon it by some of the highest minds of the present age, that there is much

reason to fear that the effect of any Prison Regulations authorized by the Executive will be liable to misapprehension by persons, however able and well-informed they may be, who have no practically acquired knowledge of the actual conditions of prison life and the varying nature of punishment in its operation. I believe the Chief Justice is of opinion that no system of punishment can ever approximate to a satisfactory state, without an intelligent classification of prisoners and ample means of carrying it out. Our prisons scarcely admit of any classification whatever, and the extent of buildings and number of officers requisite for any effective attempt of the kind would involve an expenditure which there is little prospect of being sanctioned for some time to come.

Under the most favourable circumstances of prison treatment, it seems to me that the sentence of the Courts should be awarded in accordance with law and fact, without reference to the after action of the Executive. Still more so in the unsatisfactory state of our prisons. The Judge meets the prisoner in Court for the first time; the case against him is laid bare on sworn testimony; the law overshadows the whole. To my mind it is hard to see how the vindication of the law, which is equally binding on Judge, jury and prisoner, should be influenced by any consideration of the course that may afterwards be taken by the Executive, in view of circumstances which have no existence at the time of trial. Two men may be tried for offences of the same magnitude, and may justly receive sentences of the same extent; the guilt in one case may, nevertheless, be tenfold greater than in the other. The after life and character of one prisoner may justify an extension of mercy, which would be no mercy at all if extended equally to both. This difference of cases cannot possibly be known to the Judge, but could be clearly ascertained under a proper system of classification; and, even in the state of our prisons, may become known with more or less of truthfulness through the constant supervision of a well regulated establishment, and the other channels of correct information open to the Executive. If the sentences of the Courts are adjusted, as it were, to meet the operation of Prison Regulations, they will render all Regulations comparatively nugatory and of no avail.

H. P.—4-4-67.

(No. 5.)

Minute of the Sheriff.

The question of criminal treatment is surrounded by many difficulties; but latterly there has been a decided tendency on the part of the highest authorities to agree upon some main principles. It is admitted, that to make punishment at the same time deterring and reformatory, the chief element of the treatment should be isolation as opposed to association; and "separate treatment," limited by necessary considerations as to its effect upon prisoners, mentally and physically, is regarded as the most important feature of any plan of prison discipline. There is coming to be a general concurrence in the idea that sentences of shorter periods, with a large application of that condition, would prove to be far more effective, and more advantageous, both to the State and to the criminal, than those made as at present, whereby the punishment is measured by duration.

The term "classification" is frequently used with two distinctly different meanings—the one having reference to the progress of a prisoner serving a long sentence through its several stages, and the other to the division of prisoners, under considerations of the nature of their crimes, their ages, former circumstances and habits, as well as characters developed in the prisons. The former has already, in respect to the longer-sentenced prisoners, been established here, and may, as the means increase, be extended to those of shorter sentences. The latter is, I conclude, the description of classification contemplated by the Chief Justice, and presents serious difficulties, even were the means in buildings available. Something, however, is now done in the desired direction, in the larger prisons. More may, even

under existing circumstances, be effected. It might be arranged to confine in a particular gaol most of the prisoners under a certain age (say 25) and a first conviction, together with others whom it might be judged desirable to remove from corrupting and degrading influences; and, in the other gaols, to keep such prisoners in a great degree apart from the others. The Judges have a considerable power given (as I think rightly) by the regulations, of forwarding the desired classification. For the same offence in law the sentence may, in many cases, place a prisoner in either of the classes 1st, 2nd or 3rd, between which there will be a very considerable degree of separation, which, in cases where needful, may be made complete. The Executive has the power at any time to remove a prisoner from one class to another, as for example, from the 2nd to the 3rd, by remitting the hard labour portion of the sentence.

It is necessary that the prisoners should have a full confidence that they are treated with equal justice. They acquiesce, without a sense of wrong, in any advantage possessed by a fellow prisoner, if such advantage be in accordance with the Judge's sentence; but view with much jealousy any gained by the action of the Executive authorities. I think it desirable that the position and treatment of a prisoner should, primarily, as far as practicable, be regulated by the sentence of the Judge. And I would, with deference, observe that the Chief Secretary seems to underrate the opportunities afforded to the Judge at the trial, of learning the antecedents, character and habits of a prisoner. At the trial much of the prisoner's history is brought to light, the occasion being a crisis in his career, wherein all concerning him is for the moment of chief importance. Much may be gathered from the evidence, and from his defence and demeanour. After conviction, and previous to sentence, most that is known against him is ascertained from the police; and if there be anything known in his favour, it is almost certain to be brought forward by his friends or employers. A large discretion is necessarily left by law to the sentencing Judge; and is exercised under considerations almost too numerous to mention, as circumstances of extenuation, youth, age, physical condition, and former character and habits.

The regulations do not impose upon the Judicial authority any control over, or concern with, the prisoner, after he shall have passed into the hands of the Executive —their tendency is quite the other way. Formerly, Judges were consulted upon all questions of remission—their recommendations were in effect revisions of their sentences, made by many different gentlemen; and the result was, much irritating uncertainty, anxiety, and discontent in the minds of the prisoners generally, and constant complaints of inequality of treatment. Now, remissions are obtained solely by the prisoner's own conduct and exertions, and there is no need for referring his case to a Judge, unless in relation to circumstances afterwards coming to light, and bearing upon the merits of his conviction and sentence.

With regard to the remarks of the Chief Secretary upon the condition of the prisons, it must be admitted that they are far from being in the desired state, nor can they become so until there shall be, besides other means of division, a separate cell available for each prisoner; yet I feel justified in saying that many material improvements have, within the past two years, been effected. The classification of the more important offenders, for the purpose of progressive stages through their sentences, is in successful operation. The tone and demeanour of those prisoners who have already passed through Berrima Gaol, from the A Division to the B Division in Parramatta Gaol, is in most striking contrast to the manners and conduct of prisoners of a like description who formerly entered the associated prisons in an undisciplined state. Before long, Parramatta Gaol will be almost entirely occupied by prisoners of the B Division, and then the two important establishments named may, I feel assured, be claimed to be in a highly satisfactory condition, requiring only extension in size for greater efficiency. The means of coercion obtained has enabled the authorities effectually to subdue the almost open insubordination that formerly existed in the larger prisons, and a full control is established. By the regulations, the officers have been instructed in their duties, and the prisoners in their position;

and the latter made to feel that their treatment is dependent entirely upon their own conduct. A system of accurate record of such conduct has been introduced in connection with remission of sentences, and is already exercising a most beneficial effect. The prison dietary has been effectually revised and re-established, so as to obviate the undue feeling of prisoners (formerly the subject of general complaint by the community), and the consequent indifference of a large class of offenders to imprisonment.

A plan of prison discipline has been set in operation, up to which future buildings may be constructed ; as is, indeed the case with the additions going forward at Darlinghurst and Parramatta Gaols.

(Signed), HAROLD MACLEAN.

Principal Under-Secretary.—B.C., April 11, 1867.

(No. 6.)

Minute of the Colonial Secretary.

His Excellency,—I should be glad if His Excellency would, at his convenience, read the accompanying Minutes by myself and the Sheriff, on the subject of the new Prison Regulations, and the extent to which a consideration of the effect of these regulations should influence the Judges in awarding sentences.

I notice what Mr. MacLean says of the important facts illustrative of the life and character of a prisoner, which are disclosed to a Judge at the time of trial, but I fear these facts—especially such as lie outside the sworn evidence, such as personal demeanour and the manner of witnesses—are often misinterpreted. I have spoken to members of the Bar, having a large criminal practice, who take my view in this respect.

H. P.—17-4-67.

(No 7.)

Minute of His Excellency Sir John Young (Lord Lisgar.)

In his letter of the 25th March last, the Sheriff proposes that the special attention of the Judges, both of the Supreme and Quarter Sessions Court, be specially invited to the regulations.

This proposal is in accordance with the original intention entertained at the time the framing of the Regulations was first thought of. This I think a reference to the former papers will show. It is also in accordance with the course pursued in England. There will, if I recollect right, be found in the printed Parliamentary Papers, a circular letter from Secretary Sir George Grey, to the Judges, giving them formal and authentic notice of the adoption of analogous Regulations at Home.

The sending the Judges such notices seems to me a part of the courtesy due to gentlemen holding offices of such important trust, as well as an invitation to them to co-operate with the Government. Their co-operation and advice would, in many ways, be advantageous and desirable.

Moreover, the withholding the official intimation of the Regulations from them cannot have the effect of keeping them in ignorance of their existence, nor, consequently, of preventing their taking them into consideration in passing sentences.

They have the same means of information as the rest of the public; and I am informed that as a matter of fact, the Judges of the various Courts—though not officially or formally apprised of them—do know all about the Regulations, and make reference to them in their addresses, when passing sentences on prisoners.

In my opinion, it will be better and right in itself, to make the adoption of the Regulations known to the Judges, accompanying the communication with whatever

suggestions of their opinion the Government may, on full deliberation, think proper to make.

The making of these suggestions, however, is a matter of extreme delicacy, and one which, as a precedent, may involve much difficulty and many grave consequences.

In any event, a Judge cannot but be entrusted with a wide discretion in the administration of the Criminal Law. With this discretion "the Secretary of State, in England, never pretends to interfere," while there, as here, there is great inequality in the sentences pronounced by Judges and Chairmen of Quarter Sessions for the same offence.

To the inequality of the sentences I think it would be well to draw the attention of the Judges of the various Courts, and invite them to meet and confer together, with a view of reconciling the diversity of practice and opinion in this respect.

Comparing, however, the practice which prevails in this Colony, with that in the British Islands, the excessive severity of the punishments awarded is apt to cause doubt, even more than the inequality already alluded to. The imprisonment of a young person of from eighteen to twenty-five years, for five, seven or even more years, for the offence of stealing a horse or a cow of the value of from £1 to £5, seems cruel and oppressive; and under all the circumstances of the country, beyond all measure of justice or reason. Instances of this severity are frequently brought before me, while persons in Sydney, stealing property of greater value from a shop or dwelling house, usually get sentences of only two years or less. Indeed, a case of recent occurrence in Victoria may be referred to as in point. An officer in a bank, in a confidential situation, entrusted with the custody of money, embezzled £2,000, was convicted of the offence, and sentenced to two years' imprisonment. There is no proportion between the guilt in this case, and in that of most of the persons convicted of cattle or horse stealing. The former—the guilt of an educated man betraying a trust—is clearly more heinous than that of a peasant boy who steals a half-wild cow or horse, an offence scarcely worse than poaching—than stealing a hare or a pheasant in England. No doubt there is lawlessness and wrong in the act, and it is usually the first step to worse. I do not desire to extenuate it in any degree, but surely it ought not to be visited with a heavier penalty—with twice or thrice a longer term of imprisonment—than a robbery to a much higher value, aggravated by a breach of trust, and committed under circumstances of far less temptation.

In the Evidence on Prison Discipline, taken before a Committee of the House of Lords, in 1863, witnesses of great experience give opinions in favour of short sentences under the separate system, in preference to longer sentences and association. A few months' sentence with strict discipline and distasteful penal labour may not perhaps work a moral reformation, but they are found sufficient to deter beginners from a course of crime.

This sort of deterrent influence seems to be what is wanted in New South Wales. The great majority of the young men convicted in the country parts of the Colony are not criminals by profession, but persons who have rather been led to commit robbery for the want of something just at the moment, and not concerted robberies—they are seldom associated with others, at least seldom in their first offences. As great improvements have been effected in the gaols, and the power to apply penal discipline is augmented, recourse might be had, with advantage in many respects, to shorter sentences. I speak under correction; but in my view, a sentence of imprisonment for eighteen months, or, at the most, for two years, would be ample to meet the requirements of justice, and afford protection to such property as cattle or horses, in the case of a first offence without aggravating circumstances, such as breach of trust, previous bad character, &c.; for a second offence, three to five years; for a third—which might be considered as showing the convict to be a confirmed criminal—a prolonged term of punishment.

It may be said that there exists great difficulty in the identification of previously convicted persons, so as to enable the Courts to impose the graduated punishments; but this difficulty may be reduced to a minimum by the use of photography, and by

keeping an accurate account of the name and *aliases* borne by the convict, and a description of his height, age and general appearance.

If copies of these photographs and descriptions were made and kept at every Circuit Town, the expense would not be great, and the facility afforded to the police and others, of recognising persons previously convicted, would be vastly increased; while the knowledge that such was the case on the part of the offender, would go far to deter many of those who have been betrayed into a first lapse from continuing a career of crime, especially when such knowledge was coupled, as it would be, with the certainty that each repetition of crime duly recorded and proved would bring with it a material increase of punishment, pain and inconvenience.

I only throw these suggestions out for consideration. It is clear the attention of the Judges ought to be invited, with a view to some remedy to the want of uniformity in the sentences for the same offence, and to the comparatively disproportionate severity with which some offences are visited—offences committed for the most part by young men, who cannot be considered as of the criminal class, though likely, under injudicious treatment to become so.

As a class the rural marauders are less vicious, and more easily to be dealt with than the street Arabs in the town. The latter have been exposed to the worst example, and inured from infancy to vagrancy and theft, and in consequence of such evil training, prove much more difficult of treatment, and well nigh incorrigible.

A sharp penal servitude of short duration would work a change in the former, while long terms of imprisonment would seem better suited for the latter. At present the reverse of this view obtains in practice.

After due consultation with the Judges, and full deliberation, it would be expedient to recur to Parliament for authority to shorten the sentences of imprisonment for horse and cattle stealing, should it be deemed desirable to at least try the experiment of shorter sentences with severer penal discipline.

J. Y.

(No. 4.)

(Extract.)

Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon—(*Received August* 31.)

GOVERNMENT HOUSE,
SYDNEY, July 3, 1874.

I have, in separate confidential despatches by this mail,* reported fully upon the liberation of the bushranging prisoners, and the mode of exercising the prerogative of pardon in other than capital cases, both of which subjects have given rise here lately to considerable discussion and excitement. With reference, however, to the latter question, I may add that, since the date of my despatch of the 29th June,† I have received a reply to the inquiry, which I addressed to the Governor of Victoria, as to the practice of that Colony in this particular. Sir George Bowen observes:—"The practice here with regard to pardons and mitigations of sentences has always, I believe, been similar to that which, as I understand, you have wisely established at Sydney. All petitions on the subject, whether addressed to the Governor (as they often are) or otherwise, are referred to the Law Officers, who examine each case; communicate, if necessary, with the Judge or Magistrate who presided at the trial, and then submit the papers to the Governor for his decision, with a full written Report and recommendation. I cannot believe any other course to be either constitutional or reasonable."

Thus it will be seen that, although I was not at the time aware of the fact, the practice which I have established here is precisely in accordance with the practice in

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*Nos. 1, 2 and 3. † No. 1.

Victoria and New Zealand, and practically in unison with that in force in Queensland, Tasmania, and South Australia, where such questions are decided in Executive Council. Mr. Du Cane, writing to me on this subject, observes:—"With respect to petitions for pardon or mitigation, in ordinary criminal cases the practice here is as follows:—

"Such petitions are addressed to the Governor in Council, and come to me in the first instance. They are by me 'referred to Ministers,' which really means the Attorney-General. This Minister subsequently brings the petition before the Executive Council with his recommendation. I have never, on my own responsibility, set any of his recommendations aside, but we have now and then discussed them in Council, and made alterations in questions of mitigation of the amount of time by which he has recommended that the sentence should be reduced. As a general rule, however, the Law Officers' recommendations are accepted without discussion. This is pretty much the same as the system which you have recently established in New South Wales and which appears to me to be a good settlement of the difficulty."

The only difference now in the practice of the Australasian Colonies in this respect appears to be that in New South Wales, Victoria, and New Zealand, petitions for pardon in ordinary cases are decided by the Governor upon the advice of a Minister, whilst in Queensland, Tasmania, and South Australia, they are decided by the Governor in Executive Council on the advice of one of the Ministers. I think the practice here best carries out, at all events in this Colony, the instruction in Lord Kimberley's circular despatch of the 1st November, 1871,‡ that the Governor is bound to examine personally each case in which he is called upon to exercise the prerogative of pardon. It is true that all the papers submitted to the Executive Council are sent to the Governor for his perusal before each meeting, but there is such a large mass of merely formal business passed through Council that if petitions were treated in the same manner each case would probably not be so carefully examined as if it were sent separately to the Governor with a Minute upon it by the Minister of Justice.

(No. 5.)

The Earl of Carnarvon to Sir H. Robinson, K.C.M.G.

DOWNING STREET, 7th October, 1874.

SIR,—I have to acknowledge the receipt of your despatch of the 29th of June,* in which you inclose a printed paper laid before the Parliament of New South Wales, at the bottom of page 7 of which paper is a Minute, embodying the decision arrived at by the Executive Council on the subject of the prerogative of pardon.

2. The decision of the Executive Council as contained in this Minute, being in accordance with what I believe to be the general practice in other Colonies, and also with the views of Her Majesty's Government, as expressed in my predecessor's despatch of the 17th of February, 1873,† appears to require no comment from me, except that I understand the Minute of course not to contemplate any departure from the rules laid down in Section 14 of the Royal Instructions as to capital cases; and a great part of your Minute immediately preceding it also expresses correctly the principles established for dealing with those other cases in which it is proposed that the prerogative of pardon should be exercised. But I doubt whether you correctly apprehend the meaning of my predecessor's despatch when you speak of his suggesting an "informal consultation" between the Governor and the proper Minister. Lord Kimberley, as it seems to me, suggested that, except in capital cases, such consultation need not be in the Executive Council, but I entertain no doubt that he considered, as I do, that it must be of an essentially formal character, and it is very proper that the

‡ (No. 4) in No. 1. * No. 1. † (No. 6) in No. 1.

Minister's advice should be given in writing. As Mr. Parkes correctly observes, the Minister in a Colony cannot be looked upon as occupying the same position in regard of the Queen's prerogative of pardon as the Home Secretary in this country. The Governor, like the Home Secretary, is personally selected by the Sovereign as the depositary of this prerogative, which is not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for the purpose. Actually, therefore, as well as formally, the Governor will continue to be, as he has hitherto been in New South Wales and in other Colonies, the person ultimately responsible for the exercise of the prerogative. But this is quite consistent with the further duty expressly imposed upon him, of consulting his Ministers, or Minister, before he acts.

3. While, therefore, the rule of procedure now adopted is correct, it seems necessary to point out that in the last three paragraphs of your Minute, you go somewhat too far in laying down that the exercise of the prerogative of pardon, even in minor cases, is a "branch of local administration," in regard of which the responsibility formally attached to the Governor can practically be transferred to his advisers.

4. Not only is it necessary, as has already been observed, that the power given specially by the Sovereign should be exercised only by the person to whom it is given, but the duty of a Governor to the Imperial Government renders it necessary that he should himself decide whether, in any case brought before him, the exercise of the prerogative involves questions affecting the interests of persons or places beyond the Colony, or in any other respect not purely Colonial.

5. In the case of Gardiner, from which, although it is not directly referred to in your despatch now under notice, the present question has of course arisen, a point came up for consideration, which was obviously in no sense one for the final decision of the Ministers of New South Wales, or of any one Colony, however large and important. It was proposed and decided to pardon the criminal on condition of his leaving the Colony, and remaining absent from it, under the Act 11 Vict., c. 34,‡ the provisions of which, in respect of the power of exiling criminals, have been sparingly used, and as I have elsewhere stated, ought to be practically obsolete. The effect upon neighboring Colonies, the Empire generally, or foreign countries, of letting loose a highly criminal or dangerous felon to reside in any part of the world except only that principally concerned to take charge of him, was a step which might clearly and not unreasonably give rise to complaints from without the Colony; nor could the recommendation of a Colonial Ministry in favor of such a course be of itself a sufficient justification of it.

6. I am glad to understand that the New South Wales Government is willing to take steps for repealing the fourth Section of 11 Vict., c. 34.

7. I trust that it is almost unnecessary for me to add, in conclusion, that while I have thought it not only necessary in the interests of the public service, but just to yourself and to those who may succeed you, to set forth clearly and without reservation the opinion which I entertain on the subjects referred to in this despatch, I should be altogether misunderstood if it were supposed that it is my object to imply any censure in regard to this transaction. On the contrary, I have the fullest confidence in the desire, both of yourself and your Government, to deal in a wise and prudent spirit, and on the soundest principles with a class of cases which often involve questions of great difficulty.

I have, &c.,

(Signed), CARNARVON.

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‡ Printed at page 27.

(No. 6.)

The Earl of Carnarvon to Sir H. Robinson, K.C.M.G.

DOWNING STREET,
7th October, 1874.

SIR,—I have received your confidential despatch of the 29th of June,* reporting the circumstances which have led to a change being made in the system which had hitherto existed in New South Wales in regard to the exercise of the prerogative of pardon.

2. I approve generally of the course proposed to be followed henceforth (as specified in the Minute of the 2nd of June, printed at page 7 of the Parliamentary Paper which you inclose), when the question of granting a pardon or the commutation of a sentence has to be decided.

3. You will, I apprehend, have no difficulty in conforming to the clear rule laid down in your instructions, which is based on this principle, viz., on the one hand, the Governor to whom personally the Queen delegates a very high prerogative, cannot in any way be relieved from the duty of judging for himself in every case in which that prerogative is proposed to be exercised, while, on the other hand, he is bound, before deciding, to pay the most careful attention to the advice of his Ministers, or that one of them, who, in the matter under consideration, may be selected to represent his colleagues.

4. As the setting aside by commutation of the verdict of a Court of Justice, can in hardly any case be necessary as an element in the local administration of the Colony for which the Ministers are responsible, it should seem almost impossible that any serious collision of opinion should arise on questions of this class between a Governor and his Ministers.

5. In my despatch of to-day's date,† this question has been further dealt with, and I have there explained why I consider that your Minute of the 1st of June goes somewhat further in regard of throwing the responsibility from the Governor upon the Ministers than is, in the opinion of Her Majesty's Government, altogether desirable.

I have, &c.,
(Signed), CARNARVON.

(No. 7.)

The Earl of Carnarvon to Sir H. Robinson, K.C.M.G.

(Extract.)

DOWNING STREET, 7th October, 1874.

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I cannot but think that it is open to objection that the commutation, which, as I have explained to you, I consider to have been excessive in itself, was accompanied by the condition of the prisoner's absence from New South Wales. If public opinion in the Colony had been favorable to the release of Gardiner in the ordinary manner, and he had been set free in New South Wales, the Colony would at all events have borne her share of the risk attendant on the discharge upon society of so notorious a criminal.

Even on those terms the course is one to which reasonable exception might be taken by the Governments of places beyond the Colony liable to be affected by it, and from which even troublesome complications might arise. But to release him upon the condition that he should inflict himself either upon other colonies and

* No. 2. † No. 5.

foreign countries, or upon this country, was altogether in opposition to the theory now generally adopted, and most strongly contended for at no distant date in New South Wales, that a community should not relieve itself of its worst criminals at the expense of other countries. The Act 11 Vict., cap. 34,‡ must, in spite of the occasional use which appears to have been made of its provisions, be considered to be virtually obsolete; it would clearly be very objectionable if it were extensively acted on, and therefore, it cannot be too soon repealed; but until it is repealed it must be understood that no pardon except in the case of those criminals to whom promises have been made, can be granted under the conditions of its fourth section.

(No. 8.)

The Earl of Carnarvon to Sir H. Robinson, K.C.M.G.

DOWNING STREET, 8th October, 1874.

SIR,—I have to acknowledge the receipt of your Confidential Report of the 3rd of July.*

The subject to which the despatch principally relates,—the form of procedure when the question of granting a pardon is under consideration, has been dealt with in other despatches, from which you will see that in my opinion there is no objection to the course proposed to be followed in New South Wales, which appears to me to be substantially the same as that adopted in the other Australasian Colonies, and to be generally in accordance with the Royal Instructions, it being always remembered that while the Ministers are responsible for advising the Governor, the Governor cannot divest himself of the personal responsibility which is specially entrusted to him.

I have, &c.,

(Signed), CARNARVON.

(No. 9.)

Sir A. E. Kennedy, K.C.M.G., to the Earl of Carnarvon.—(*Received November* 11.)

GOVERNMENT HOUSE,
HONG KONG, 3rd October, 1874.

MY LORD,—I have the honour to enclose, for the information of your Lordship, the copy of a letter received from the United States' Consul at this port protesting against the embarkation for the United States of a person who had been pardoned by the Governor of New South Wales, and had recently arrived at Hong Kong from that Colony.

I also enclose a copy of the reply addressed to the Vice-Consul by my order, in which he was told that the Government could not interfere with the departure from the Colony of a person who had received the Queen's pardon and had not committed any subsequent offence.

I have, &c.,

(Signed), A. E. KENNEDY,
Governor.

(Inclosure 1 in No. 9.)

UNITED STATES' CONSULATE,
HONG KONG, 24th September, 1874.

SIR,—I have the honour to call the attention of His Excellency the Governor to the fact that this Consulate has positive information that the notorious highwayman

‡ *Vide* page 27.

* No. 4.

named Gardiner, *alias* Frank Christie, lately pardoned by His Excellency the Gov ernor of the Colony of New South Wales, Australia, arrived in this port on the 21s inst. from the Port of Newcastle, New South Wales, Australia, as a passenger on th English barque "Charlotte Andrews," Captain Place commanding, and that there i reason to believe that it is the intention of certain person or persons to procure hi transmission from Hong Kong to a port in the United States.

With these facts before me, it becomes my duty, as the Consular Officer of th United States in charge of the United States' Consulate at this port, to protest in th strongest possible manner in behalf of my Government as against any such proceed ing, and to most respectfully request that this Government will take such action a will prevent this man being shipped, or sent as a passenger on any vessel boun from this port to a port in the United States.

It would appear from information in my possession from the United State Consul at Melbourne, that this man is no ordinary criminal—that he was for som years the terror of New South Wales, and is said to have caused, directly and in directly, not less than forty deaths by violence.

I have, &c.,

(Signed), H. S. LORING,
United States' Vice-Consul.

Honourable J. GARDINER AUSTIN,
Colonial Secretary.

(Inclosure 2 in No. 9.)

COLONIAL SECRETARY'S OFFICE,
HONG KONG, 30th September, 1874.

SIR,—I have the honour to acknowledge the receipt of your letter of the 24th inst. informing me that a person, late a convict in Australia, had arrived in thi Colony *en route* for the United States, and asking that steps might be taken to pre vent his being shipped or sent on any vessel bound from this port to a port in th United States.

In reply, I am desired by His Excellency the Governor to inform you that th Government cannot interfere with the departure from the Colony of the perso alluded to, as he has received a pardon in the Queen's name which entitles him to hi freedom, and he does not appear to have committed any offence subsequently.

I have, &c.,

(Signed), JOHN GARDINER AUSTIN,
Colonial Secretary.

H. LORING, Esq., Vice-Consul for the United States,
Hong Kong.

(No. 10.)

The Earl of Carnarvon to Sir A. E. Kennedy, K.C.M.G.

DOWNING STREET, 2nd December, 1874.

SIR,—I have received your despatch of the 3rd of October,* and I approve of th answer which you caused to be sent to the protest addressed to you by the United States' Consul against the embarkation for the United States of an ex-convict, named Gardiner, who had recently arrived at Hong Kong from New South Wales.

I have, &c.,

(Signed), CARNARVON.

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* No. 9.

(No. 11.)

Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(*Received February* 22.)

GOVERNMENT HOUSE,
SYDNEY, 30th November, 1874.

MY LORD,—I enclose copies of the Sydney *Morning Herald* of the 25th and 26th instant,† containing reports of the recent debate in the Assembly in the Gardiner release question, from which your Lordship will perceive that, during the progress of the discussion, it was asserted by different speakers that I "had insulted and degraded the House by unconstitutional interference and criticism."

2. I think that I should not rest content with the simple defeat by the Speaker's casting vote of an address founded upon such grave accusations, but that I am bound to point out to your Lordship that the charges in question were only supported by representations which are not in accordance with fact.

3. I think I can best show this by giving, in the first instance, a brief narrative of the events in connection with this case in the order in which they occurred.

4. In 1872, shortly after my arrival here, I promised a prisoner named Gardiner that he should be allowed to exile after he had undergone ten years' imprisonment in gaol. I have already reported fully all the circumstances under which I was induced to make this promise, and I need not therefore repeat them here. It will be sufficient to state simply that the particular form of release promised was authorized by law, that it was strictly in accordance with precedent, and that in making such a promise without the formal advice of Ministers, I was following the practice which had been in force in this Colony from the first establishment of responsible Government up to that time, of leaving Her Majesty's Representative to exercise the prerogative of mercy (except in capital cases) according to his own independent judgment.

5. Two years later—that is in June last—this matter was brought before Parliament. A motion was made that an Address should be presented to me, disapproving of Gardiner's release, which after five nights' debate, was negatived by the Speaker's casting vote. Technically, therefore, the House in its collective capacity approved my decision. In effect it was with me and not against me. There was no Address, and I was free to hold to my promise if I thought proper, without being thereby placed in a position of antagonism to the House.

6. The case was then taken up by the public out of doors, influenced probably by the narrowness of the majority in the House. Two public meetings were held in Sydney, one of which petitioned me to keep faith with Gardiner, the other to break it. Four public meetings were held in different parts of the country, each of which petitioned me adversely to the proposed mitigation of Gardiner's sentence. Other meetings were in contemplation, and were announced. I was also daily receiving communications on the same subject from private individuals. It was evident from this that the public out of doors were impressed with the idea that I would probably, after the debate in the House, reconsider the case, and that a little pressure from without might perhaps turn the scale, which had been so evenly balanced in Parliament, the other way.

7. It was obviously desirable that this agitation should not be unnecessarily prolonged, and that a final decision in Gardiner's case should at once be come to and announced. I ascertained that Ministers, having technically carried the House with them, did not propose to offer me any advice on the subject. They felt, I believe, that the honor of the Crown was concerned, and that having tacitly acquiesced in my making the original promise they should leave me free to decide with reference to its fulfilment as I thought right. If, upon a review of all the circumstances, I thought the promise should be kept, they were prepared to acquiesce in such decision. If, on the other hand, I thought there were sufficient grounds for breaking it, Ministers felt that it would be better I should come to such decision upon the merits of the case alone, uninfluenced by any pressure from my advisers.

† Not printed.

8. The duty of deciding in this matter therefore devolved upon myself personally. It was one I could not shirk. I accordingly went into the case carefully from first to last. I examined attentively all the petitions and other communications which had been addressed to me on the subject, as well as the speeches made at the public meetings at which the petition had been adopted. The epitome of the case presented to me by these proceedings and documents was simply this: I was asked to break the promise which, in my capacity as Her Majesty's Representative, I had given to Gardiner, because it was asserted (1) such promise had been made under false representations, and (2) the carrying out of such promise would imperil the public safety. I considered the question in the light of these representations, and conferred with the judicial, prison and police authorities on the subject. I arrived, after mature consideration, at the conclusion that the promise had not been made under materially incorrect representations, and that the apprehensions expressed for the public safety were not based on grounds sufficient to justify a departure from my promise. I thereupon embodied my views in a minute which I laid, with the petitions and memorials, before the Executive Council; and that body, having considered the papers, were of opinion that sufficient grounds did not exist to warrant them in advising me to depart from the promise made to Gardiner in 1872. I accordingly determined to adhere to such promise, and to refuse the prayer of the petitions.

9. Such being the case, it was desirable, with a view to stop further agitation, that the final decision so come to should at once be made public, as well as the reasons upon which it was founded. A simple rejection of the petitions without reasons would have given offence. Such a course would assuredly have been misunderstood, and would probably have been the signal for renewed agitation, and perhaps, as had been threatened, for petitions to the Throne. It was desirable that the petitioners should see that the decision was my own—that I had anxiously considered their reasons and their statements—and that I had decided on the course which appeared to me to be the only course open to the Government consistent with honor and justice.

10. After full consideration it was agreed between the Colonial Secretary and myself that a courteous acknowledgment should be sent to each of the six bodies of petitioners, with a copy of the proceeding of the Executive Council as the best way of shewing them the careful manner in which all their representations had been weighed. This was done, and the result I think showed the prudence of the course adopted; for the further public meetings contemplated were allowed to fall through, and the agitation which was being excited on the subject at once ceased.

11. Mr. Parkes considered also that as questions were being asked almost every night in Parliament as to the course which the Government intended to pursue in Gardiner's case, it would be only courteous to lay the paper which was about to be sent to the petitioners at the same time upon the table of both Houses. It is customary here for Ministers to lay before Parliament unasked all public papers which are likely to prove either useful or interesting; and it was thought undesirable to make any exception in this case. Indeed, it was felt that Parliament might fairly have complained of being slighted if the final decision of the Executive Government in a matter in which the Legislative Assembly had taken, and apparently still took, a warm interest were communicated to the public outside whilst it was withheld from Parliament. The proceedings of the Executive Council in the matter which had taken place on the 24th June, were accordingly laid with a number of other papers, on the table of both Houses on the following day—the 25th June—with a view to their being printed and circulated in accordance with custom during the recess—Parliament being about to be prorogued on that day.

12. This act of laying on the table the paper in question was taken exception to when Parliament met after the recess, and an Address for presentation to myself condemnatory of that proceeding, as well as of the tenor of the document itself, was submitted to Parliament and defeated by the Speaker's casting vote. It was during the debate which ensued on this motion that the charges against me were made which I have referred to in the first paragraph of this despatch.

13. As to the complaint that the paper embodying the proceedings of the Executive Council with respect to the release of Gardiner was laid before the House, I need scarcely, I think, offer any further comment. It was a step for which the Ministry at once accepted the entire responsibility—explaining that it was intended as a simple act of courtesy in order that the Assembly might know at the earliest possible moment the decision in Gardiner's case, and the reasons upon which it was based.

14. As regards the tenor of the minute itself, which was complained of in the debate as insulting to both the petitioners and to Parliament, I would wish to offer a few remarks. The passage complained of in my minute was as follows:—"If, while entertaining, as I do, these opinions, I were to break faith with the prisoner, and retain him in gaol beyond the time specified for his liberation, I should be doing so, not because I think such a course necessary, but simply in response to clamour which I believe to be unreasonable and unjust." Now it must be borne in mind that I was writing for the Executive Council in reference to resolutions adopted at public meetings, urging me to break my promise to Gardiner on the ground that such a pledge would, if carried out, imperil the public safety. I had admitted in the earlier part of the minute that if the fulfilment of the promise would have that effect it ought to be cancelled. The question, therefore, was simply whether the petitioners were right or not in their view as to the probable peril to the public safety, as if they were I should not by my own admission have been justified in keeping faith with Gardiner. But when I came to look into the reasons advanced for breaking my promise, I felt that they were insufficient to justify my taking such a step. It appeared to me that the excitement which had been got up about this case was to a great extent artificial; and that the larger number of those who had spoken at the public meetings were apparently unacquainted with the principles which should govern the treatment of criminals, and were at the same time evidently laboring under a misapprehension as to the cause which the Government had proposed to pursue. In short, I thought that an excitement had been got up in the public mind on this subject without sufficient information and reflection, and that I could not in honor break my promise in deference to views which in my judgment were so entirely insufficient. In writing for the Executive Council, I saw no reason why I should not state precisely what I meant. I believe the noise which had been made about this case was "clamour," and I so described it. I might no doubt have expressed the same ideas in other words, but to whatever extent I had modified the meaning, I should have weakened my own case. If I had thought the views expressed by the memorialists as to the public safety sound and reliable, I should have felt bound to yield to them. It was because I thought them the result of excitement without sufficient reason that I felt called on to act on my own judgment, supported as it was by the opinions of the judicial, prison and police authorities, with whom I have consulted on the subject. The result has shown that I was right. Gardiner has been allowed to exile, and certainly there are as yet no signs whatever of the public safety having been in any way imperilled; nor has the sense of public security been in the slightest degree diminished by his conditional release. It has, therefore, now been proved that if I had broken my promise it would have been in deference to fears which have since been shown to have been without sufficient foundation.

15. It is of course open to question whether it was wise or not to send so candid a document as my Executive Council Minute to the Petitioners. Upon this point I have only to say that after full consideration at the time, in view of all the surrounding circumstances, it was thought to be on the whole the best course which could be followed; and the effect was precisely that which was anticipated. Within a week of the publication of the Minute all agitation on the subject was dead; and the case was apparently forgotten until it was revived by the late proceedings in the Assembly.

16. As regards the charge that my Minute was a censure upon Parliament, and an unjustifiable and unconstitutional interference with its proceedings, I do not think that that document can, by even the most strained construction of language, be held to be open to any such accusation. As I have shown, it was addressed to the

Executive Council. It contained my reasons for adhering to my decision to release Gardiner, notwithstanding the petitions and memorials which had urged me to alter that decision. It dealt only with the arguments advanced in those communications, and from the first word to the last it contained no reference or allusion whatever, direct or indirect, to Parliament or Parliamentary discussions.

17. Nevertheless, member after member, as will be seen from the accompanying extracts from the debate, treated the Minute as a Message addressed to the House, and declared that I had thereby censured the House for being clamorous, unreasonable and unjust. A very little reflection might, I think, have sufficed to show not only the incorrectness but the absurdity of such an allegation. The House had refused to present an Address to me disapproving of Gardiner's release. In effect, therefore, the Assembly was with me and not against me in the course I proposed to pursue; and if I had yielded to the prayer of the Petitioners, it could not have been said to be "in response" to the wish of the Assembly, that body having by its vote refused to join in any such application. In short, the Minute was never intended for Parliament, and cannot, I maintain, by even the most far-fetched construction of its language, be made applicable to it. All that can possibly be said with truth is that my answers to the arguments of the Petitioners were equally applicable to any similar arguments which may previously have been used in debate. But I did not so apply them. I had to answer the Petitioners, but I had nothing to do with the discussions in Parliament. The House in its collective capacity had disposed of the arguments of the minority by rejecting the proposed Address, and there the matter would have rested, but for the subsequent petitions and memorials for originating which, or for the arguments contained in which, I was not in any way responsible. The great bitterness displayed in the recent debate not unnaturally led to the suggestion that members were needlessly insisting upon identifying themselves with the Petitioners. Mr. Stewart, one of the oldest independent members of the House, and a gentleman of unimpeachable integrity and character, remarked, "he thought His Excellency gave very satisfactory reasons for refusing to comply with the prayer of the Petitioners, and it was due to the Parliament and the country that he should give some reasons why he arrived at a determination to take a certain course. The Honorable Member for Bathurst also told them that the Minute was characterised by extraordinary self-confidence, and a perfect disdain of the opinions and sentiments of the people of the Colony. He thought it showed exactly the reverse, and it was extraordinary that the Honorable Member and those who supported him should see these things, which escaped the attention of other people. Perhaps they were conscious that they had raised an unreasonable and baseless clamour some time ago, and perhaps they felt a sort of reproach that they sympathised with the clamour, if they did not actually foster it. No doubt, some time ago, alarm was felt, on the assumption that Gardiner was about to be released from gaol, and let loose upon the country; but as soon as it was found that the assumption was based upon misunderstanding and misrepresentation, the agitation and clamour subsided. He was confident that there was but one Member of the House who could have been induced to submit this resolution with the object in view, because he thought there was but one object in view, and that was to displace the Ministry."

18. An attempt was made during the debate to compare this Gardiner case with the Rossi case and to make out that the proceedings in each were analogous. But this was an error. The cases are wholly dissimilar. In the Rossi case, a Committee of the House tried a volunteer officer and recommended his dismissal. The Report of the Committee was adopted by the House and transmitted to me by Address. I replied by a Message declining to carry out the recommendation of the Committee on the ground that its proceedings were contrary to law: and, after a debate of five nights, the resolution adopting the Report was rescinded. In this Gardiner case the proposed Address disapproving the release of Gardiner was defeated. It was accordingly never sent to me at all; and no message could have been sent by me in reply. Nevertheless, in the recent debate, my Minute to the Executive Council was treated

as a Message to the House in reply to an Address, which, not having been carried, was never transmitted.

19. There is one point of similarity, however, between the two cases, which, although it escaped observation, during the recent debate, is nevertheless, I think, deserving of consideration. It is this, that in both these cases my proceedings have been exposed to Parliamentary criticism through my having had imposed on me personally as Her Majesty's Representative, administrative functions independent of my responsible advisers. There are, of course, political duties which the Governor as holding the balance between contending parties, must always necessarily perform upon his own independent judgment—such, for example, as the refusal or acceptance of the resignation of the Ministry; the selection of a new Premier, and the granting or refusal of a dissolution, when asked for. But the late discussions in Parliament have, I think, clearly shown that no possible advantage which can be gained by requiring the Governor personally to take the initiative in ordinary administrative acts can compensate for the animadversions to which his proceedings must, in such case, be exposed in the popular branch of the Legislature.

20. In both the Rossi and the Gardiner cases my conduct was brought under review in the House, because by the law, and the constitutional practice of this colony, duties were imposed upon me, personally, which in the neighbouring Colonies devolve not upon Her Majesty's Representative but upon his responsible advisers.

21. In the Gardiner case, all the subsequent unpleasantness grew out of the practice which had been in force here, ever since the establishment of responsible Government, of leaving the Governor to exercise the prerogative of mercy, except in capital cases, upon his own independent judgment. I always thought the practice erroneous; but I was not responsible for its establishment. On the contrary, it had been in operation for sixteen years before my arrival in New South Wales, and I abolished it as soon as ever I could get my advisers to concur in the change. During the time, however, that the system was in force, I made, on behalf of the Crown, an engagement to which I subsequently felt bound in honor to adhere. My action was severely criticised by the Assembly. But surely I was not to blame for that conflict of opinion. It was the unavoidable result of the exceptional system in force in this Colony which had imposed such functions upon me.

22. So, too, in the Rossi case. The Volunteer Act of New South Wales enacts that the Governor, as the Queen's Representative shall be the Commander-in-Chief of all the local forces raised in the Colony, and imposed on him certain specific duties in that capacity. The Law Officers of the Crown have decided that the Act requires the Governor as Her Majesty's Representative to exercise the functions of the Commander-in-Chief upon his own responsibility without reference to his Executive Council. And yet when I refused to carry out the recommendation of the Assembly and to dismiss an officer illegally, I was accused of placing myself in collision with the House. It seems somewhat inconsistent to entrust to Her Majesty's Representative, who is not responsible to Parliament, certain special duties apart from his advisers, and then when he exercises his functions in the manner which in his judgment best accords with the honour and dignity of the Crown to complain that his view does not command the unanimous approval of the popular branch of the Legislature.

23. Perhaps it might be urged by persons who do not look below the surface that what has been complained of in these cases has not been so much my decisions, as the manner in which I communicated them. But those who could advance such a plea with sincerity, must, I think, be wanting in political discernment. The real grievances in these cases were that I would not dismiss Rossi, and that I would not break faith with Gardiner. In whatsoever manner these decisions had been announced they would have been displeasing to a number of persons who would never have been at a loss for an excuse upon which to express their dissatisfaction. For example, if I had given no reasons in the Gardiner case, it would have been urged that I had none that were valid, or that I had insulted a large body of loyal subjects by witholding them. If I had modified my reasons so as to make them less unacceptable to the

Petitioners, they would have been pronounced weak, and altogether insufficient to justify the conclusion. Whilst, if the reasons had not been laid before both Houses, Ministers would have been charged with intentional disrespect in withholding from Parliament information which had been communicated to the public out of doors.

24. There is only one way in which the Governor's action can be kept out of the heated atmosphere of Parliamentary discussions, and that is by relieving him, as far as possible, from the duty of taking the initiative in the transaction of administrative business. His action, as regards such details, should, I think, be limited to accepting or rejecting the advice of his Ministers. The importance of maintaining this principle appears to have been recognized and acted upon to a greater extent in the neighbouring Colonies than it has been in New South Wales. In Victoria, for example, the Volunteer Act imposes the duties which here devolve personally upon the Governor as Commander-in-Chief, upon the Governor with the advice of his Executive Council; so that responsibility for the exercise of administrative functions in military, as in all other local matters, devolves there upon the Ministers. Again, throughout all the Colonies, with the exception of New South Wales, the prerogative of pardon has, since the establishment of responsible Government, been exercised under the advice of either the Executive Council or of an individual Member of the Cabinet. And one advantage has at all events been gained here by the attacks which have been so persistently made upon me in reference to Gardiner's release, that the system in New South Wales has at length been brought into conformity with that of the neighbouring Colonies in respect to the remission and commutation of ordinary sentences.

25. I trust that the foregoing explanation will have satisfied your Lordship that I have not laid myself open to the imputations which were advanced against me in the recent debate. I was placed in a position in which it was my primary duty, as Her Majesty's Representative, to maintain the honour of the Crown; and in discharging this obligation to the best of my judgment and ability, I do not see that I am fairly chargeable with a single act which can rationally be construed into an offence to the Assembly, or an unconstitutional interference with its proceedings.

I have, &c.,

(Signed), HERCULES ROBINSON.

(Inclosure 1 in No. 11.)

1873-4—New South Wales.

Release of the Prisoner Gardiner. (Minute by His Excellency Sir Hercules Robinson, and Proceedings of the Executive Council with respect to.)

Presented to both Houses of Parliament by Command.

(No. 12.)

The Earl of Carnarvon to Sir H. Robinson, G.C.M.G.

Downing Street, 20th March, 1875.

Sir,—I have the honour to acknowledge the receipt of your Despatch of 30th November,* in which you justify, with reference to objections which had been raised in the Legislative Assembly, the course taken by you in regard to the question of the release of Gardiner.

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* No. 11.

2. In my former despatches on this subject I have so fully explained my opinions both in this particular case, and also generally with respect to the exercise of the prerogative of pardon, that I need not now enter into any further discussion of these questions.

3. It is unnecessary for me to say that I accept without hesitation your explanation of the circumstances under which you followed the course to which exception was taken, and your assurance that the answers contained in your Minute on the arguments of Petitions which had been addressed to you had no reference to the discussions in the Colonial Parliament.

4. Papers on this subject are about to be laid before Parliament, and I shall have pleasure in causing your despatch now under acknowledgment to be added to them; and as some of your confidential despatches contain statements which are necessary for a clear understanding of the case and of your connection with it, and which you have not otherwise communicated to me, it will be desirable that these also, with my replies, should be included.

I have, &c.,

(Signed), CARNARVON.

APPENDIX.

(No. 1.)

Clause VI of Governor's Commission, dated 23rd February, 1872.

And we do further authorize and empower you as you shall see occasion, in Our name and on Our behalf, when any crime has been committed within Our said Colony, to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information and evidence as shall lead to the apprehension and conviction of the principal offender; and further to grant to any offender convicted of any crime in any Court, or before any Judge, Justice or Magistrate within Our said Colony, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to you may seem fit, and to remit any fines, penalties or forfeitures which may become due and payable to Us.

(No. 2.)

Clause XIV of Instructions to Governor, dated 23rd February, 1872.

And whereas We have, by Our said Commission, authorized and empowered you, as you shall see occasion, in Our name and on Our behalf to grant to any offender convicted of any crime in any Court, or before any Judge, Justice or Magistrate within Our said Colony, a pardon, either free or subject to lawful conditions: Now We do hereby direct and enjoin you to call upon the Judge presiding at the trial of any offender who may from time to time be condemned to suffer death by the sentence of any Court within Our said Colony, to make to you a written Report of the case of such offender, and such Report of the said Judge shall by you be taken into consideration at the first meeting thereafter which may be conveniently held of Our said Executive Council, where the said Judge may be specially summoned to attend; and you shall not pardon or reprieve any such offender as aforesaid, unless it shall appear to you expedient so to do, upon receiving the advice of Our Executive Council therein; but in all such cases you are to decide either to extend or to withhold a pardon or reprieve, according to your own deliberate judgment, whether the members of Our said Executive Council concur therein or otherwise; entering, nevertheless, on the Minutes of the said Council, a Minute of your reasons at length, in case you should decide any such question in opposition to the judgment of the majority of the members thereof.

(Canada—No. 248.)

The Earl of Carnarvon to the Earl of Dufferin.

DOWNING STREET,
18th October, 1875.

MY LORD,—I duly received and considered your Lordship's despatch, No. 96 of the 13th of April, communicating to me an Address voted to the Queen by the House of Commons of Canada on the subject of the New Brunswick Schools Act of 1871, and I have thought it convenient to defer my reply to it until your return to Canada.

The Address was laid at the foot of the Throne, and the Queen was pleased to receive it very graciously, but I was not able to advise Her Majesty to take any action respecting it.

2. I concur with the representation of the Address that Legislation by the Imperial Parliament curtailing the powers vested in a Province by the British North America Act, 1867, would be an undue interference with the Provincial Constitutions, and with the terms on which the Provinces consented to become members of the Dominion, and holding as I do this opinion, while I cannot but feel that if I were to recommend the Queen to intervene directly in this matter by advising that Legislature to legislate in any particular direction, I might be deemed to counsel an interference with the system of government established by the Act of Union not greatly differing from that which the Address deprecates.

3. For this reason I have not felt myself at liberty to advise Her Majesty to take any action with respect to this Address. At the same time there can be no impropriety in my expressing the strong hope which I entertain that, as in other British communities, the majority of the population in New Brunswick, which through its representatives controls the educational system of the Province, may be disposed to adopt such modifications of the existing rules as may render them less unacceptable to those who from conscientious reasons have felt themselves obliged to protest against the system now in force.

4. I cannot in conclusion consistently with my duty, refrain from observing that as education is one of the subjects expressly and exclusively reserved to the Provincial Legislatures by the "British North America Act, 1867," it is for the serious consideration of those in New Brunswick who take an active part in relation to it, whether there can be any advantage, and whether there must not be serious inconvenience in bringing under public discussion in the Dominion Legislature a controverted question which may possibly engender much heat and irritation, and over which it has no jurisdiction.

I have, &c.,

(Signed), CARNARVON.

Governor General
The Right Honorable
The Earl of DUFFERIN, K.P., K.C.B.

FURTHER CORRESPONDENCE relating to the Exercise of the Prerogative of Pardon in New South Wales. (In continuation of Papers presented to Parliament, April, 1875: C.—1202.)

TABLE OF CONTENTS.

(No. 1.)

Governor Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(Received April 12.)

GOVERNMENT HOUSE,
SYDNEY, 8th February, 1875.

MY LORD,—I have the honour to acknowledge the receipt of your despatch of the 7th October,* which has, at the suggestion of my advisers, been communicated to Parliament. I inclose some spare copies for facility of reference in your Lordship's department.

2. The decision that whilst the Governor is bound to consult his Ministers, he is still ultimately responsible for the exercise of the prerogative of pardon, has, I think, been generally received here as a proper and satisfactory settlement of the difficulty. I inclose a leading article which I have extracted from the Sydney *Morning Herald* on the subject.

* *Vide* No. 5 of Command Paper [C. 1,202], April, 1875.

3. The course prescribed by your Lordship is precisely that which has been adopted here for the last eight months. All petitions and applications for commutation of sentence reach me from the Department of Justice, with the Minister's recommendation minuted upon them. These papers are then carefully perused by me before deciding on each case, and in the only instance in which I have been unable to concur with the Minister's recommendation he has at once acquiesced in the force of my objection.

I have, &c.,

(Signed), HERCULES ROBINSON.

(Inclosure in No. 1.)

Article from the Sydney 'Morning Herald' of 2nd February, 1875.

The despatch from Earl Carnarvon which has reached the Colony just as the Gardiner question has worked up its political crisis is the commentary of the Secretary of State on that question of prerogative which was connected with the earlier stages of this controversy. This despatch is definite on two points: first, as to the *locus* of the responsibility in respect to the granting of pardons; and secondly, in respect of the policy of exiling prisoners. On both these points Earl Carnarvon has to express an opinion which is to some extent at variance with that of the Colonial Government, and therefore he is expressly careful to guard himself against being supposed to imply any censure on either Governor or Government. But while willing to recognise the importance of making the responsible Ministers in the Colony responsible for their advice with respect to the pardons granted to prisoners, he will not admit that that responsibility should rest exclusively with them, or that pardon should be considered as a branch of the local administration in the same sense in which the other details of Government are so. On the contrary, he insists on it that the Governor is the representative of Her Majesty, so far as concerns the exercise of the Royal prerogative of pardon, and that this prerogative is delegated by her only to selected and trusty servants. In the mother country it is delegated to the Home Secretary. In the case of a Colony it is impossible for Her Majesty to delegate it in the same way personally to a Colonial Secretary, of whom she has no knowledge, and in whose nomination she has no direct voice. In a Colony the Governor alone can be her direct representative, and it is to the Governor, therefore, that she delegates the responsibility of this important prerogative. In this respect, as in some others, the fact of the Colony being a dependency makes it impossible to imitate precisely the form of procedure adopted in the mother country, where personal contact with the Sovereign is possible.

Nor does the Earl of Carnarvon at all approve of the idea that the Ministerial responsibility is to be in any way got rid of or mitigated by informal consultations between the Governor and the Minister specially charged with the penal department. On the contrary, he intimates that the advice should be as specific, as clear, and as unmistakable as in other cases. From this arrangement, rendered necessary by the fact that the Royal prerogative could only be delegated to persons selected and named by Her Majesty, it follows that both the Governor and the Cabinet will possess a responsibility in the matter; it will not be halved between them, but each will possess it fully. Granting pardons is a branch of the local administration, and will be considered as such; Ministers will have to decide what they think it right to recommend, and will have to make their recommendations distinctly; but before doing as they recommend, and exercising or refusing at their wish the Royal prerogative, the Governor will have to consider that he is the depositary of that prerogative for the time being, and that he is to exercise it, subject to his own responsibility for doing it wisely. No amount of advice tendered to him would justify him in doing what he thought his Sovereign would disapprove.

It is obvious that, under these circumstances, there may possibly arise a collision between a Governor and his Minister. It will be part of the duty of Governors always to exercise such tact in the performance of their duty as to prevent such collision if possible; and it will be the duty of judicious Ministers always to seek to avoid it. But still collisions may happen, and it is obvious that this kind of difficulty is one which attaches to the system of Responsible Government in the Colonies, and which does not attach to it in England. It is one of the anomalies which arise out of importing into a Dependency a system of Government that is not really native to the soil, but that has been applied to our circumstances in a spirit of traditional attachment. It will rest with all those who have any share in Government to do what lies in their power to prevent the theoretical difficulty from ever becoming a practical one. The cases will probably be very rare and exceptional in which the double responsibility will lead to a conflict that cannot be got over.

It will be remembered that Mr. Parkes, when laying down the doctrine—generally a sound one—that responsibility and power should go together, demurred to any system in which he should be called upon to tender advice which might possibly not be followed. The Earl of Carnarvon's reply, however, is to the effect that this system must be followed in this particular case, for the reason that Her Majesty's prerogative of pardon would otherwise rest with persons of whom Her Majesty knew nothing. It is very seldom, however, that the pardoning of a criminal becomes a political question in the way this affair of Gardiner has done. This was a very unusual conjuncture of circumstances, and may not happen again for many a long year, and in fact it would not have happened at all if the principles now laid down in the Earl of Carnarvon's despatch had been understood and acted upon twelve months ago. For in that case, instead of Mr. Parkes having an informal conversation for an hour, and leaving the Governor under a certain impression, there would have been distinct Ministerial advice tendered under definite Ministerial responsibility. According to Mr. Parkes' statement in the House, if he had been asked to advise, he would not have advised the immediate release of this particular criminal, and in that case it is probable that the Governor would have acted in accordance with the advice tendered to him, and the particular difficulty we have had to struggle with would never have arisen. If Mr. Parkes had been willing to take the responsibility of giving advice, and run the risk of having it not acted upon, he would have avoided the rock on which he has steered his Cabinet, and would probably now have still been Premier. Such advice had been tendered previously on some occasions, though not as a rule, and under the circumstances it would have been more discreet, as events have shown, if this had been made one of the cases in which Ministers thought it sufficiently important to express their convictions formally. The rule is now laid down for the future that such advice is to be uniformly tendered; and if this rule is acted upon, there can never again come a case in which the Governor can say that he was substantially influenced by his Minister, and as to which the Minister can at the same time say that he shook off all responsibility, because he had neither been asked for advice, nor had he tendered it.

The other point of importance with which the despatch deals is the exile of prisoners. On this, the Secretary of State is quite clear that the Governor ought to allow no exile except on his own responsibility, and in fact ought not to grant exile at all. The legality of the act he admits, but the power, he says, has been sparingly used, and ought to be practically obsolete. It is a practice calculated to give rise to reasonable complaints, nor could the recommendation of a Colonial Ministry justify the Governor in adopting it. At the time of Gardiner's exile the difficulty seems to have been far less felt by the Government than by the people. It had been the law for years, and it had been acted upon, and the Government felt no difficulty in continuing to act upon it: but the notoriety into which this transaction had brought the custom made it obviously undesirable to continue it. The whole world was made aware of the fact that an Australasian Colony, which had taken the lead in protesting against transportation, was in the habit of exiling its worst criminals. We have already had reclamations from California, and we are not unlikely to have them from other parts of

the world. It was this difficulty which made the pardoning of Gardiner so undesirable in the estimation of many who petitioned against it. There were some who thought he might be safely let loose in the Colony, but this was not the general opinion; and if it was not safe to let him loose here, and if it was not proper to exile him elsewhere, what other alternative was there but to keep him in confinement? This difficulty will continue in the future. If exile is to be practically prohibited under instructions from the mother country, we must find out how to deal with our criminals ourselves, and in that case we must adopt such precautions as will be suitable to the circumstances. We have, however, invited other countries long ago to solve the same social problem, and we can hardly complain when we are called upon to carry our own principles into effect.

(No. 2.)

(Extract.)

Governor Sir H. Robinson, K.C.M.G., to the Earl of Carnarvon.—(*Received April* 12.)

GOVERNMENT HOUSE,
SYDNEY, 8th February, 1875.

I have the honour to report that, upon the meeting of Parliament on the 28th ultimo, the following amendment to the Address in reply to my opening Speech was moved by Mr. J. Robertson in the Legislative Assembly:—

"We would desire, with reference to the important matter which led to the dissolution of the late Parliament, most respectfully to express our regret that Your Excellency's Responsible Ministers should have advised you to communicate to the Legislative Assembly your Minute to the Executive Council, dated the 23rd June last, with reference to the release of the prisoner Gardiner, because it is indefensible in certain of its allegations, and because if it is considered to be an answer to the respectful and earnest petitions of the people, it is highly undesirable to convert the records of this House into a means of conveying censure or reproof to our constituents; and if it refers to the discussions in this Chamber, then it is in spirit and effect a breach of the constitutional privileges of Parliament."

Upon a division, this amendment was carried the same night against the Government by 33 to 29 votes. The House then adjourned, inadvertently omitting to make the usual order for the presentation of the Address by the whole House, and it was accordingly presented to me next day by the Speaker in a manner which precluded me from making the usual verbal rejoinder.

Upon the following day (29th), Mr. Parkes tendered the resignation of himself and his colleagues. I took time to consider what course I should adopt, as I felt placed in a difficulty by the wording of the amendment, which was not merely a censure upon my advisers, but a personal imputation upon myself as well as an invasion of the rights of my office.

Upon the 2nd I accepted the resignation of Ministers, and Sir William Manning, a distinguished Member of the Upper House, in response to my invitation, accepted the task of forming a new Administration. At the meeting of the House the same afternoon, I transmitted to the Legislative Assembly the Message, a copy of which is annexed.

On the 5th, Sir William Manning, having failed in his attempt, relinquished the task, and by his advice I then sent for Mr. Robertson, who undertook the formation of an Administration. I, at the same time, placed in Mr. Robertson's hands a memorandum, explaining the reasons which had led me to my sending for Sir William Manning, and pointing out that I was in no way responsible for any delay or difficulty which had occurred in forming a new Government. I enclose a copy of this memorandum.

Mr. Robertson asked for time till to-day to complete his arrangements, and he has just presented me with a list of the new Ministry, which is composed as follows:—

Mr. John Robertson, Colonial Secretary.
Mr. William Forster, Treasurer.
Mr. Thomas Garrett, Secretary for Lands.
Mr. Lucas, Secretary for Mines.
Mr. John Lackey, Secretary for Public Works.
Mr. Docker, Minister for Justice and Public Instruction.
Mr. J. F. Burns, Postmaster-General.
Mr. Dalby, Attorney-General.

These gentlemen, with the exception of Mr. Dalby, will to-morrow be sworn in as Members of the Executive Council. The Attorney-General, under the existing arrangement, is a Member of the Government without a seat in the Executive Council.

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(Inclosure 1 in No. 2.)

1875.

LEGISLATIVE ASSEMBLY.—NEW SOUTH WALES.

Address in Reply to the Governor's Opening Speech. (*Message No.* 2.)

[Ordered by the Legislative Assembly to be printed, February 2, 1875.]

HERCULES ROBINSON, *Governor.* *Message No.* 2.

GOVERNMENT HOUSE,
SYDNEY, 2nd February, 1875.

The Governor having been precluded, by the mode of presentation of the Address of the Legislative Assembly, in reply to his opening Speech, from giving his answer in the usual manner, deems it respectful to the Assembly to do so by Message.

2. He acknowledges with satisfaction their expressions of loyalty to Her Most Gracious Majesty.

3. He cannot, consistently with his duty, acquiesce in the statement that a Minute laid by him before the Executive Council was indefensible in certain of its allegations. As ultimately responsible for the exercise of the prerogative of mercy, the Governor claims for himself unreserved freedom of communication with the Executive Council while seeking its advice; and he cannot admit that the Minute, viewed in that light, was not entirely justifiable.

4. While thus asserting the constitutional rights of the office which he has the honour to hold, the Governor trusts he will ever pay the fullest respect to those of the representatives of the people, and he, therefore, with this qualification, is prepared to accept the decision of the Assembly.

(Inclosure 2 in No. 2.)

Memorandum by His Excellency the Governor for Mr. Robertson.

I desire to point out that for any delay or difficulty connected with the formation a new Administration I am not responsible.

If the amendment to the Address had stopped, as I think it should have done, at the end of the first sentence, expressing regret that I had been advised to lay my Executive Council Minute upon the table of the House, all difficulty would have been obviated. I should in such case have accepted the resignation of Ministers, and probably at once have sent for Mr. Robertson to form a new Administration. I should not myself have concurred with the House as to the impropriety of the step censured, or as to the importance attached to it, but my own views on these points would

have been immaterial. I should have recognized the fact that the matter was one upon which it was competent for the House to hold and express its own opinion, and I should at once have proceeded to give to that opinion its intended constitutional significance.

But the amendment went further, and proceeded to give reasons for the regret entertained by the House, which it was quite unnecessary to communicate to me. The first reason advanced was that my Minute to the Executive Council was indefensible in certain of its allegations. It appeared to me that this was not only a personal imputation upon myself, but an invasion of the constitutional rights of my office, and that the Legislative Assembly were not justified in presenting to me an address couched in such terms.

My difficulty was increased by the unusual mode adopted by the Assembly as regards the presentation of the Address. It has been the almost invariable practice for the Legislative Assembly to attend at Government House with the Address in answer to the Governor's Speech on opening Parliament, to which the Governor has been in the habit of giving a verbal reply. On this occasion the course adopted left me no alternative but silence or a message; and I had no opportunity for the latter, subsequent to the resignation of Ministers which took place late on Friday the 29th January, before the following Tuesday the 2nd of February, the next day appointed for the meeting of Parliament.

When, therefore, the Cabinet, tendered their resignations, I felt placed in a position of unprecedented difficulty; for whilst I was prepared to give effect to the implied wish of the Assembly as regards a change of Ministry, I was not prepared to pass over in silence an encroachment upon the prerogative of the Crown. But I could not accept the resignation of Ministers until I had placed the formation of an Administration in other hands. If I had sent down my protest against what I conceived to be the unconstitutional part of the Assembly's amendment before accepting the resignation of Ministers, my readiness to acquiesce in the decision of the Assembly upon that part which was clearly within their constitutional rights might possibly have been called in question. If, on the other hand, I had sent for Mr. Robertson, and entrusted to him the formation of a Government, and then sent down my protest to the House, Mr. Robertson, and probably the leading members of the Opposition who had carried the amendment, would have been absent from their seats. It appeared to me indispensable that the leaders of the party who had carried the the amendment should be present in their places, and free to take what action they pleased when my message in reference to the amendment was read to the House.

A fair escape from these several difficulties presented itself in the selection of Sir William Manning, a distinguished member of the Upper House, to form a Government. Sir William Manning's ability and character, and the high respect in which he is held throughout the entire community, appeared to fit him especially for such a position. He had been associated with Mr. Robertson in former Administrations, and he had been designated by public rumour as one of the leading members of a new Government in the event of Mr. Robertson being entrusted with its formation.

Besides, apart from the special reasons which led me to ask Sir William Manning to undertake the responsibility of forming an Administration, the plan seemed to me to offer the best possible chance of forming a strong Government. It appeared to me that supported, as I thought he would have been, by the leading members of the Opposition, it would have been possible for Sir William Manning to have united under his leadership a party able to carry on the Government of the country with vigour for a lengthened period. I have been disappointed in the experiment; but looking to the state of parties in the Assembly, the narrowness of the late majority, and the exceptional character of the question which resulted in the present crisis, I fail to see that there was any arrangement which held out a better prospect of success, viewed solely in the light of the public good. I do not regret, therefore, having made the attempt.

With these observations, which are, I think, called for from me under the peculiar circumstances of this case, I am prepared to give effect to Sir William Manning's

recommendation, which is, that as he has failed in obtaining the help he anticipated, I should now send for Mr. Robertson.

(Signed), HERCULES ROBINSON.

GOVERNMENT HOUSE,
SYDNEY, 5th February, 1875.

(No. 3.)

The Earl of Carnarvon to Governor Sir H. Robinson, K.C.M.G.

DOWNING STREET, 26th April, 1875.

SIR,—I have the honor to acknowledge the receipt of your despatch of the 8th of February,* reporting the circumstances which led to the resignation of your late Ministry, and the formation of a new Administration under Mr. Robertson.

In the exceptional circumstances which you report, the course taken by you in this case appears to have been the right one, and I see no reason to take exception to the terms of the Message which you addressed to the Assembly on the 2nd February.

I have, &c.,
(Signed), CARNARVON.

(No. 4.)

The Earl of Carnarvon to Governor Sir H. Robinson, K.C.M.G.

DOWNING STREET, 27th April, 1875.

SIR,—I have the honour to acknowledge the receipt of your despatch of the 8th of February,* on the subject of the exercise of the prerogative of pardon.

I am glad that you have been enabled to form so favourable an opinion of the working of the principles enunciated in my despatch of the 7th of October last.†

I have addressed you at greater length on this question in a separate despatch.

I have, &c.,
(Signed), CARNARVON.

(No. 5.)

The Earl of Carnarvon to Governor Sir H. Robinson. K.C.M.G.

DOWNING STREET, 4th May, 1875.

SIR,—As there has been, and may still be, some misunderstanding, both in this country and the Colonies, with respect to the opinion held by successive Secretaries of the State as to the distribution of responsibility between a Colonial Governor and his Ministers when the prerogative of pardon is exercised, I think it will be convenient, now that the question is attracting attention as well at home as in some Colonies, that I should endeavour once more to explain, to best of my ability, the intention and true interpretation of the Royal Instructions on this subject.

2. It has been represented to me that, in the account which I gave to the House of Lords, on the 16th ultimo, of the procedure followed in the different Australasian Colonies (quoting in this case from your despatch of 3rd July, printed at page 46 of the inclosed Parliamentary Paper),‡ I did not accurately describe the course taken in Victoria, in which Colony I am told that the practice of deciding these questions at a sitting of the Executive Council still prevails.

* No. 2.

*No. 1. † *Vide* No. 5 of Command Paper [C. 1,202] April, 1875. ‡ No. 4 of same Paper.

3. If my statement—which, it may be observed, did not relate to capital cases only, but to all commutations or remissions of sentences—was incorrect, I am very glad that it should be corrected; but I do not consider that the essence of the matter consists in the mode of taking the opinion of Ministers, the important point appearing to me, as I stated in my despatch of 7th October,‡ to be that the Governor should not act without having received in some formal manner the advice, either of his Ministers collectively, or of the Departmental Minister alone, as the gravity of the case may seem to him to demand.

4. Leaving, then, the details of the procedure open in some respects to such unobjectionable variations as convenience or usage may have established in each Colony, the following statement of the object and operation of the Royal Instructions will, I think, be found clear and intelligible.

5. It should, therefore, be understood that no capital sentence may be either carried out, commuted, or remitted, without a consideration of the case by the Governor and his Ministers assembled in Executive Council. A minor sentence may be commuted or remitted by the Governor after he has duly considered the advice either of his Ministers collectively in Executive Council or of the Minister more immediately responsible for matters connected with the administration of justice; and whether such advice is or is not tendered in Executive Council, it would seem desirable that, whether also given orally or not, it should be given in writing.

6. Advice having thus been given to the Governor, he has to decide for himself how he will act. Acting, as he does in an Australian Colony, under a system of Responsible Government, he will allow greater weight to the opinion of his Ministers in cases affecting the internal administration of the Colony than in cases in which matters of Imperial interest or policy, or the interests of other countries or Colonies, are involved. For example, in two recent cases in New South Wales, (1) when a kidnapper on the high seas, tried and sentenced under an Imperial Act by the Colonial Court, was pardoned; and (2) when a sentence was commuted on condition of exile from the Colony, questions arose in regard to which it could not be contended that the affairs and interests of New South Wales alone were involved.

7. But whether the case might be one more immediately concerning the internal administration of the Colony, or one of wider import, it has seemed to me, as well as to my predecessors, that the Royal Institutions not only lay down a sound constitutional view, but provide a mode of procedure which is calculated to assist the Colonial Governments in the administration of justice without infringing upon the responsibility of Ministers.

8. It is true that a Governor may (and, indeed, must, if in his judgment it seems right) decide in opposition to the advice tendered to him. But the Ministers will have absolved themselves of their responsibility; and though in an extreme case which, for the sake of argument, may be stated, although it is not likely to arise in practice, Parliament, if it disapproves the action taken, may require the Ministers to resign, either on the ground that they tendered wrong advice, or that they failed to enforce recommendations deemed to be right, I do not think that the great principle of Parliamentary responsibility is impaired by this result. On the other hand, a Governor who, by acting in opposition to the advice of his Ministers, has brought about their resignation, will obviously have assumed a responsibility for which he will have to account to Her Majesty's Government.

9. It has, I am aware been argued that Ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the Prerogative of Pardon. But I am led to believe that this view does not meet with general acceptance, and there is at all events one good reason why it should not. The pressure, political as well as social, which would be brought to bear upon the Ministers if the decisions of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequence might be a serious interference with the sentences of the Courts.

‡ No. 4 of same Paper.

10. On the whole, therefore, I hope that the Colonial Legislatures and public opinion generally will concur with me in the opinion that the existing rule and practice is salutary, and may with advantage be maintained.

I have, &c.,

(Signed), CARNARVON.

(No. 6.)

Circular Despatch to the Governors of the Australasian Colonies (except New South Wales).

DOWNING STREET, May 4, 1875.

SIR, MY LORD,—I have the honour to transmit to you, for your information, and for communication to your Ministers, a copy of a despatch which I have addressed to the Governor of New South Wales, with regard to the exercise of the Prerogative of Pardon*

The subject is one of interest to the Colony under your government no less than to New South Wales. I trust that the views which I have expressed will be found to accord generally with those of your Ministers, to whose observations, if they desire to offer any, I shall be ready to give my best attention.

I have, &c.,

(Signed), CARNARVON.

COPY *of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council, on the 29th February,* 1876.

The Committee of the Privy Council have had under consideration the Report, hereunto annexed, from the Honorable the Minister of Justice, dated 22nd December, 1875, on the despatch from the Honorable Her Majesty's Secretary of State for the Colonies, of the 5th November, 1875, on the question of Ministerial responsibility in connection with the disallowance of Provincial Acts, and they respectfully submit their concurrence in the views expressed in the said Report, and advise that a copy thereof and of this minute be transmitted by Your Excellency for the consideration of Her Majesty's Government.

Certified.

(Signed), W. A. HIMSWORTH,
Clerk, Privy Council.

DEPARTMENT OF JUSTICE.

OTTAWA, 22nd December, 1875.

The undersigned to whom has been referred the despatch of the 5th November, 1875, from the Earl of Carnarvon to His Excellency upon the minute of Council of the 8th March, 1875, on the question of ministerial responsibility in connection with the disallowance of Provincial Acts, begs to report as follows :—

The minute was evoked by a despatch from Earl Kimberley, dated June 30, 1873, in which His Lordship upon the advice of the Law Officers of the Crown in England, instructed His Excellency that the question whether a Provincial Act should be disallowed was a matter in which His Excellency should act on his own individual discretion, and in which he could not be guided by the advice of his responsible Ministers.

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* No. 5.

In order to a clear understanding of the question raised, a brief preliminary statement is requisite.

The powers of Provincial Legislatures are, by their constitution, limited to certain subjects of a domestic character, so that their legislation can affect only Provincial and at most Canadian interests.

Provincial Acts are, to the extent to which they may transcend the competence of the Legislature, inoperative *ab initio*. There is no power to "allow" them, nor can any attempted "allowance" give them vitality, so that void acts left to their operation remain void thereafter.

Provincial Acts are, to the extent to which they may be within the competence of the Legislature, operative *ab initio*, and so continue unless and until disallowed.

Lord Carnarvon, in the despatch now under review, states that in his opinion the constitution of Canada does not contemplate any interference with Provincial legislation on a subject within the competence of the Local Legislatures.

Without attempting to expound the principles on which the power of disallowance should be exercised, the undersigned may be permitted to observe that the considerations involved are of a more complex and delicate character than might, at first sight, be perceived.

So long ago as June 9, 1868, an Order in Council was passed on the subject, adopting a memorandum from the Minister of Justice expressing the following views:—

"The same powers of disallowance as have always belonged to the Imperial "Government with respect to Acts passed by Colonial Legislatures have been con- "ferred by the Union Act on the Government of Canada. Of late years Her "Majesty's Government has not, as a general rule, interfered with the legislation of "colonies having representative institutions and responsible Government, except in "the cases specially mentioned in the instructions to the Governors, or in matters of "Imperial and not merely local interest.

"Under the present constitution of Canada the general Government will be "called upon to consider the propriety of allowance or disallowance of Provincial "Acts, much more frequently than Her Majesty's Government has been, with respect "to Colonial enactments.

"In deciding whether any Act of a Provincial Legislature should be disallowed "or sanctioned the Government must not only consider whether it affects the inter- "ests of the whole Dominion or not, but also whether it be unconstitutional, whether "it exceeds the jurisdiction conferred on Local Legislatures, and, in cases where the "jurisdiction is concurrent, whether it clashes with the legislation of the general "Parliament."

Without discussing how far this memorandum accurately states the circumstances under which the power of disallowance may be exercised, and referring only to the cases to which Lord Carnarvon more especially alludes, it will be found that in their disposition numerous grave and difficult questions may arise. There may be a Provincial jurisdiction for a particular purpose, exercised in fact, though not in form, for the accomplishment of another purpose exclusively within Canadian jurisdiction.

It is very often doubtful whether an Act is within or beyond the competence of the Local Legislature. Frequently, local Acts are mainly valid, but yet contain some provision beyond the competence of the Legislature.

In the character of the enactments beyond the competence of the Legislature, there is a vast difference, since, though all such provisions are alike void, yet some Acts might be left to their operation without inconvenience, while to take the same course as to others might produce serious embarrassment and confusion. It is, in each particular case, a question to be decided whether the Act, through containing some void provisions, should be disallowed or left to its operation, and in practice a considerable number of such Acts are so left.

It thus appears that whatever be the range of the power of disallowance, and the principles on which it should be exercised, it must often be very difficult to decide whether on the whole, any particular Act should be disallowed or left to its operation.

The question at issue is by whom and under what responsibilities the power of disallowance is to be exercised.

The power of disallowance of Canadian Statutes is by Section 56 of the British North America Act, 1867, vested in the Queen in Council.

By Section 90 of the same Act this provision is extended and applied to each Province as if it were re-enacted, and is so made applicable in terms thereto, with the substitution among other things of the Governor General for the Queen.

The result is that, by the express words of the Act, the power of disallowance of Provincial Statutes is vested in the Governor General in Council—a phrase which under the 13th Section of the Act means "the Governor General acting by and with "the advice of the Queen's Privy Council for Canada."

If the British North America Act had not contained these express provisions, it would seem that upon the plain principles of the constitution the result would have been the same.

Supposing that the Act had vested the power of disallowance of Canadian Statutes in Her Majesty not adding the words "in Council" it will not be contended that the power so given could be constitutionally exercised otherwise than under the advice of Her Majesty's Ministers, who would be responsible for Her Majesty's action, and, by parity of reasoning, a power of disallowance of Provincial Statutes given to the Governor could be exercised only under the advice of his Ministers, who would be responsible for his action.

It results from preceding observations that the only contingencies which can arise are :—

1. That the Governor should propose to disallow a Provincial Statute without or against the advice of his Ministers;

2. That Ministers should propose to disallow a Provincial Statute without the assent of the Governor.

The position taken by Council is that neither of these things can be done; that the power being vested in the Governor in Council, any action taken must be accomplished by Order in Council, and that a Governor who thinks it necessary that a Provincial Act should be disallowed, must find Ministers who will take the responsibility of advising its disallowance; while Ministers who think it necessary that a Provincial Act should be disallowed, must resign unless they can secure the assent of the Governor to its disallowance,—Ministers being in every case responsible to Parliament for the course taken.

Lord Carnarvon suggests that the question is one in respect of which it is more in accordance with the spirit of the constitution that a rigid rule of action should not be established.

But the undersigned ventures to submit that the question involves simply the application to a plain statute of the well-settled rules of construction, and the application to a plain case of the fundamental principle of the constitution.

It is to the spirit as well as to the letter of the constitution that Council have appealed, and grave would be their responsibility were they to agree that either spirit or letter contemplates a rule of action so lax as to justify or even to render possible the violation of its fundamental principle.

Lord Carnarvon refers to a correspondence (annexed to his despatch) with an Australian colony upon the subject of the exercise of the Prerogative of Pardon, and suggests that the rule there propounded is applicable to the present case.

It seems needless to complicate the question in hand by any extended discussion of the views expressed in that correspondence, which will come more fitly under review in connection with another despatch now under the consideration of Council.

Were the undersigned to assume (without admitting) the accuracy, as applied to Canada, of the propositions there advanced, he would yet observe that whether sound or unsound they are founded upon one main consideration, which is supposed to involve exceptional treatment of the question, namely, that "the Governor to whom "personally the Queen delegates a very high prerogative (that of pardon) cannot in "any way be relieved from the duty of judging for himself in every case in which

" that prerogative is proposed to be exercised; and this the more, since it may be " invoked in cases 'in which matters of Imperial interest or policy or the interest of " 'other countries or colonies are involved.'"

It is argued that this consideration authorizes and indeed requires the Governor to act in the exercise of that particular prerogative in some manner and to some extent differently from the mode in which he is ordinarily to act, and investing him with exceptional power, necessarily diminishes *pro tanto* the responsibility of his Ministers;—

But however this may be, the consideration referred to does not apply to the case in hand.

There is here no question of a high prerogative of Her Majesty delegated by Her, under special commission to Her confidential officer, and capable of being used by that delegate in matters which may involve Imperial or foreign interests.

The power here is not vested in and consequently could not be delegated by Her Majesty.

The power here,—a power the exercise of which affects Provincial and Canadian interests, is by an Act of Imperial Parliament vested in the Governor in Council, and the undersigned maintains with confidence that to the exercise of a power so vested it is impossible to apply the principle propounded as applicable to the case of the Prerogative of Pardon. Nor is it possible to deal with this power on principles different from those which apply to the exercise of the other powers of Government conferred in like terms by the same Statute. Thus in effect the discussion involves the whole question of responsible government, and if the rule proposed by Lord Carnarvon is conceded it would be impossible to resist its application to our entire system.

That rule is, that "The Governor General, after having recourse to the advice of " his Ministers whom the Parliament holds answerable for advising him as to all his " public acts (though not in all cases for the acts themselves), may properly be " required to give his own individual decision as to allowance or disallowance."

Lord Carnarvon proceeds to say that the constitutional remedy for any prolonged difference of opinion between the Governor General and his advisers would be the same in this as in any other case of a similar nature, and that, holding, as he does, the opinion that the Constitution of Canada does not contemplate any interference with Provincial Legislation on a subject within the competence of the Local Legislature, by the Dominion Parliament, or as a consequence by the Dominion Ministers, he assumes that those Ministers would not feel themselves justified in retiring from the administration of public affairs on account of the course taken by the Governor General on such a subject,—it being one for which the Dominion Parliament cannot hold themselves responsible, though it may demand to know what advice they gave.

The undersigned ventures to submit that the plan proposed by Lord Carnarvon is not in accordance with the Constitution:—that His Excellency's Ministers (whose recommendation is essential to action) are responsible not merely for the advice given but also for the action taken:—that the Canadian Parliament has the right to call them to account, not merely for what is proposed, but for what is done;—in a word, that what is done is practically *their* doing.

The importance to the people of the advice given by Ministers is in precise proportion to its effectiveness. So long as the course pursued is dependent on the advice given, responsibility for the advice is responsibility for the action, and is therefore valuable: but it is the action which is really material; and to concede that there may be action contrary to advice would be to destroy the value of responsibility for the advice,—to deprive the people of their constitutional security for the administration, according to their wishes, of their own affairs,—to yield up the substance, retaining only the shadow of responsible Government.

The undersigned agrees with the view of Lord Carnarvon that, if it be the right and the duty of the Governor to act in any case contrary to the advice of his Ministers, they cannot be held responsible for his action, and should not feel themselves justified on account of it in retiring from the administration of public affairs. But

these are results which render it difficult to come to the conclusion that any such right or duty can properly devolve upon the Governor; because they shew that his action would be an exercise of power for which the free people over whom he rules could find no man whom they could call to account.

The undersigned suggests that Lord Carnarvon should be informed that, while Council concur in his view that His Excellency's correct appreciation of public feeling, and the thorough understanding which exist between His Excellency and His advisers, are of themselves sufficient to render improbable any serious difference of opinion on the subject of the disallowance of a Provincial Statute, and while they highly appreciate the great consideration shown by Lord Carnarvon in explaining in so clear a manner his conception of the principle applicable to the question under discussion, it appears to them to be essential to the good administration of affairs and to the maintenance of the proper relations between the Governor General, the Ministers, and the Parliament, that there should be a correct understanding as to their relative rights and duties, and that for the reasons given in this report, they remain of the opinion that no action can be taken on the question whether a Provincial Statute should be disallowed save by and with the advice of His Excellency's Ministers, who are, and of right ought to be, responsible to Parliament for such action.

(Signed), EDWARD BLAKE.

(No. 91.)

GOVERNMENT HOUSE,
OTTAWA, 8th April, 1875.

MY LORD,—I have the honour, at the request of my Privy Council, to transmit to Your Lordship a copy of a Report made to me by a Committee of that body on the question of Ministerial Responsibility in connection with the disallowance by the Governor General of Acts passed by the Legislatures of the several Provinces of the Confederation.

I have, &c.,

(Signed), DUFFERIN.

The Right Honorable
The Earl of CARNARVON,
&c., &c., &c.

(Canada.—Secret.)

The Earl of Carnarvon to the Earl of Dufferin.

DOWNING STREET, 5th November, 1875.

MY LORD,—In connection with the despatch, No. 248, of the 18th October which I have addressed to you on the subject of the Address of the House of Commons, respecting the New Brunswick Schools Act of 1871, I have had under my consideration your despatches, No. 89, of the 7th April, and No. 91 of the 8th April last, in the latter of which you transmitted to me a Report of a Committee of the Dominion Privy Council on the question of Ministerial responsibility in regard to the disallowance of the Governor General of Acts passed by the Provincial Legislature.

2. In this Report your Ministers observed that while my predecessor had decided that in such matters the Governor General should act in his own individual discretion, not being guided by the advice of his responsible Ministers, a contrary opinion, being that which they adopted, had been conveyed in a letter from the Privy Council Office.

3. Your Ministers proceeded to argue that the effect of Section 90 of the "British North America Act, 1867," was to vest the power of assent or disallowance in the Governor General in the same manner as in other cases it is vested in the Queen by Sections 56 and 57, which mention the "Queen in Council,"

4. The point at issue is one which, if its decision became a matter of practical urgency, could I apprehend, be finally decided only by an appeal to the Judicial Committee of the Privy Council from a Colonial judgment on the construction of the Act. But I feel that there is, for the present, at all events, no practical necessity for an authoritative or conclusive determination of it, and that it is indeed one in respect of which it is more in accordance with the spirit of the Constitution that a rigid rule of action should not be established.

5. In a recent Australian case (papers relating to which I enclose for your information) I have had occasion to lay down what appears to me to be the twofold or divided responsibility of the Queen's representative and his Ministers in the exercise of the prerogative of pardon. In that case the Governor is required to consult his advisers, but ultimately to act on his own responsibility; and so in the case of a Provincial Act it seems to me that the Governor General, after having recourse to the advice of his Ministers, whom the Parliament holds answerable for advising him as to all his public acts (though not in all cases for the acts themselves) may properly be required to give his own individual decision as to allowance or disallowance. Nor is there any real difficulty in perceiving how this procedure, at first sight, perhaps, apparently inconsistent, would work in practice.

The constitutional remedy for any prolonged difference of opinion between the Governor General and his advisers would be the same in this as in any other case of a similar nature. Holding, as I have already explained the opinion that the constitution of Canada does not contemplate any interference with Provincial legislation, on a subject within the competence of the Local Legislature, by the Dominion Parliament, or, as a consequence, by the Dominion Ministers, I assume that those Ministers would not feel themselves justified in retiring from the Administration of Public Affairs on account of the course taken by the Governor General on such a subject; it being one for which the Dominion Parliament cannot hold themselves responsible, although it may demand to know what advice they gave.

6. I have endeavored, on account of the consideration which I feel for the views of your Ministers, to explain as clearly as I am able my conception of the principles applicable to the final completion of Provincial Legislation, but I am glad to feel that your correct appreciation of public feeling and the thorough understanding which exists between you and your advisers, are of themselves sufficient to render most improbable any serious difference of opinion on such a subject.

I have, &c.,

(Signed), CARNARVON.

Governor General
The Right Honorable
The Earl of Dufferin, K.P., K.C.B.

Copy *of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 8th March,* 1875.

The Committee of Council have had under consideration the question of Ministerial responsibility in connection with the disallowance of Acts passed by the Local Legislatures of the Confederate Provinces.

Lord Kimberley, late Secretary of State for the Colonies, in a despatch dated June 30th, 1873, having reference to the disallowance of certain Acts passed by the New Brunswick Legislature with regard to the School system in that Province makes the following statements:—

"I am advised—

"1. That these Acts of the New Brunswick Legislature are, like the Acts of 1871, within the powers of that Legislature,

2. "That the Canadian House of Commons cannot constitutionally interfere with their operation by passing a resolution, such as that of the 14th of May last. If such a resolution were allowed to have effect, it would amount to a virtual repeal of the section of the British North American Act, 1867, which gives the exclusive right of legislation in these matters to the Provincial Legislature.

"3. That this is a matter in which you must act on your own individual discretion, and on which you cannot be guided by the advice of your responsible Ministers of the Dominion."

Section 90 of the British North America Act, 1867, reads as follows:—

"The following provisions of this Act respecting the Parliament of Canada, namely: the provisions relating to Appropriation and Tax Bills, the recommendation of money votes, the assent to Bills, the Disallowance of Acts, and the signification of pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada."

The power of disallowance is here clearly vested in the Governor General in the same manner as the power of assent or disallowance is vested in Her Majesty by Sections 56 and 57, that is in the Queen in Council.

The Committee, therefore, humbly submit that the passage above quoted would, if acted upon, destroy all Ministerial responsibility and impose on the Governor General a responsibility not intended by the Statute, and at variance with the Constitution. It would also be impracticable in operation, as some competent legal authority must examine the Statutes passed by the Local Legislatures to enable the Governor General to arrive at an intelligent decision. If this could be done by importing the services of any one outside the Privy Council it would establish a subsidiary body not contemplated by the Constitution. If done by the Minister, or Ministers, then Ministerial responsibility at once attaches.

That this view is taken by Her Majesty's Privy Council, the following letter written by Mr. Reeve, Clerk of the Council, and dated 13th December, 1872, clearly shows.

Mr. Reeve to Mr. Holland.

PRIVY COUNCIL OFFICE, 13th December, 1872.

SIR,—I have submitted to the Lord President of the Council your letter of the 9th instant, transmitting a copy of a despatch from the Governor General of Canada with enclosures, respecting an Act passed by the Provincial Legislature of New Brunswick with reference to Common Schools and requesting to know whether the opinion of the Lords of the Judicial Committee of the Privy Council on this question can properly be obtained.

It appears to His Lordship that as the power of confirming or disallowing Provincial Acts is vested by the Statute in the Governor General of the Dominion of Canada acting under the advice of his constitutional advisers, there is nothing in this case which gives to Her Majesty in Council any jurisdiction over this question, though it is conceivable that the effect and validity of this Act may at some future time be brought before Her Majesty on an appeal from the Canadian Courts of Justice.

This being the fact His Lorship is of opinion that Her Majesty cannot with propriety be advised to refer to a Committee of the Council in England a question which Her Majesty in Council has at present no authority to determine, and on

which the opinion of the Privy Council would not be binding on the parties in the Dominion of Canada.

I have, &c.,

(Signed), HENRY REEVE,
Reg. P.C.

HENRY T. HOLLAND, Esq.

The Committee advise that a copy of this Minute be transmitted by Your Excellency for the consideration of Her Majesty's Government.

Certified.

(Signed), W. A. HIMSWORTH,
Clerk, Privy Council.
